

Administrative Arbitrariness: A Synthesis

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Wonders never cease. A commentator's gloss upon a statute first conceived after its enactment as the "best solution" he could devise for a "difficult problem,"¹ confessedly not required either by the statutory text or legislative history and not, of course, called to the attention of Congress, has been lifted by a follower to the level of "codified doctrine."² The "solution" thus canonized was that of Professor Kenneth Culp Davis. His follower, Mr. Harvey Saferstein, postulates that there was a "common law of non-reviewability," *i.e.*, "a refusal to hear an allegation" of arbitrariness,³ which has been codified as the "doctrine 'committed to agency discretion'" in the Administrative Procedure Act (APA).⁴ For his "common law doctrine" Mr. Saferstein relies upon some exceptions to the general rule that arbitrariness is reviewable,⁵ and from these he distills a "general presumption *against* review" in the teeth of an acknowledged "general presumption *for* review."⁶ When one considers that the "general

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1. "I do not say that the statutory words require my interpretation. Nor do I say that the legislative history must be interpreted my way . . . It is the best solution that I have been able to find for a difficult problem." Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 825 (1966).

Because the statutory terms posed no "problem" for me, and because the Davis "solution" rewrites the statute without warrant, I entered upon an extended debate with Professor Davis. See articles cited note 9 *infra*.

2. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 367-68, 374 n.33 (1968) [hereinafter cited as Saferstein]. As summarized by the editors, there has been a "codification of the 'committed to agency discretion' doctrine in the Administrative Procedure Act." *Id.* 367.

3. Saferstein 367 n.3, 368 n.5.

4. *Id.* 368.

5. Mr. Saferstein does not cite pre-1946 cases but relies on Professor Davis for his "common law doctrine." *Id.* 367 n.3, 374. Professor Davis states:

Normally, but with occasional exceptions for special circumstances, the courts will not try to correct arbitrariness or abuse of discretion in such activities as foreign affairs, personnel management, decisions of military officers . . . and so forth. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.16, at 17 (Supp. 1965).

6. Saferstein 370 (emphasis added), 372, 379.

Professor Davis himself, citing Professor Jaffe's conclusion that "[p]resumptively, an exercise of discretion is reviewable for . . . 'abuse'" states: "I agree." Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643, 647 (1967). "[J]udicial review is the rule. . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest." Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 432 (1958). As the Supreme Court as recently expressed it, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

Explaining the first exception to Section 10, Chairman Walter of the Senate Judiciary

presumption for review" is buttressed by the clear Section 10(e) directive that the courts "shall . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"⁷ it is a wondrous feat to emerge with "agency immunity from review."⁸ Mr. Saferstein's uncritical acceptance of the demonstrably untenable Davis "solution" prompts me to essay a compact statement of the evidence I have marshalled in the course of a lengthy debate with Professor Davis⁹ in order to aid other readers to grasp the essentials.

For more than 125 years before the passage of the APA the Supreme Court declared again and again that there is no room for arbitrary action in our system, that power to act arbitrarily is not delegated.¹⁰ Together with almost all of the Circuits it stated without equivocation across a wide spectrum of administrative activity that arbitrary action is reviewable.¹¹ True, there were occasional exceptions; but in view

Committee said: "Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing and unmistakable under this bill." S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946) [hereinafter cited as S. Doc. No. 248]. The House Report states: "To preclude judicial review under this bill, a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it." S. Doc. No. 248, at 275. Both Senate and House Reports state, "Very rarely do statutes withhold judicial review." *Id.* at 212, 275.

7. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1946).

8. The doctrine "committed to agency discretion" "is also used to preserve an agency's immunity from review against a claim that the review provisions of the APA override the relevant common law doctrine of nonreview." Saferstein 369. *But see* Wales v. United States, 130 F. Supp. 900, 904 (Ct. Cl. 1955): "[T]he doors of this court are always open to grant relief" against "arbitrary or capricious" action. "The Supreme Court has long recognized the right of the court to review such action." And Mr. Saferstein charges that Judge Friendly and myself "read the doctrine out of the APA!" Saferstein 375, 373.

9. Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 [hereinafter cited as Berger, *Article*]; 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.16 (Supp. 1965) [hereinafter cited as Davis, *Supplement*]; Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966) [hereinafter cited as Berger, *Reply*]; Davis, *Administrative Arbitrariness—A Final Word*, 114 U. PA. L. REV. 814 (1966) [hereinafter cited as Davis, *Final Word*]; Berger, *Administrative Arbitrariness—A Rejoinder to Professor Davis' "Final Word,"* 114 U. PA. L. REV. 816 (1966) [hereinafter cited as Berger, *Rejoinder*]; Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966) [hereinafter cited as Davis, *Postscript*]; Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967) [hereinafter cited as Berger, *Sequel*]; Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967) [hereinafter cited as Davis, *Not Always*].

10. *E.g.*, "there is no place in our constitutional system for the exercise of arbitrary power." *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908). Our institutions "do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "The delegated power, of course, may not be exercised arbitrarily . . ." *FCC v. Schreiber*, 381 U.S. 279, 292 (1965). For other citations, see notes 82-87 *infra*.

11. *Federal Radio Comm'n v. Nelson Bros. Bond & Mtge. Co.*, 289 U.S. 266, 277 (1933): "[A]n arbitrary or capricious finding does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts . . . belongs to the judicial province . . ." *United States v. Pierce*, 327 U.S. 515, 536 (1946) ("abuse of the Commission's discretion"); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612 (1946) (court should consider

of the haphazard, compartmented development of "administrative law"—only recently did that rubric supplant "Druggists," "Mines and Minerals," and "Telegraph and Telephone" where one had been wont to seek light on administrative law problems—it is not surprising that judges were not impelled to coordinate the exceptions with the general rule. Let us defer whether an individual should, or indeed constitutionally may, be left at the mercy of unreviewable, and therefore unbridled, arbitrariness¹² on grounds of judicial or administrative convenience,¹³ and turn to the statute. For it is the statute, over

whether the "Commission abused its discretion"); *Dismuke v. United States*, 297 U.S. 167, 172 (1936) (officer's "decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious"); *Shields v. Utah-Idaho R.R.*, 305 U.S. 177, 185 (1938) (whether finding "was arbitrary and capricious"); *Silberschein v. United States*, 266 U.S. 221, 225 (1924) (order of Veterans Bureau final "unless . . . clearly arbitrary or capricious."); *Manufacturers R.R. Co. v. United States*, 246 U.S. 457, 481 (1918) (discretion of ICC not to be disturbed unless it "amounts to an abuse of power"); *Langnes v. Green*, 282 U.S. 531, 541 (1931) ("When invoked as a guide to judicial action it means a sound discretion . . . a discretion exercised not arbitrarily . . .").

Eastland Co. v. FCC, 92 F.2d 467, 471 (D.C. Cir. 1937) (court must affirm unless action is "arbitrary and capricious"); *Ickes v. Underwood*, 141 F.2d 546, 548 (D.C. Cir. 1944) (whether Secretary of the Interior applied statute in a "reasoned manner"; court will issue restraining order where he acted in a "capricious and arbitrary manner"); *Arner Co. v. United States*, 142 F.2d 730, 736 (1st Cir. 1940) (libel under Food & Drug Act; unless "arbitrary or unreasonable, the terms of the exception can be prescribed in the discretion of the administrator"); *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 587 (2d Cir. 1941) ("Only if the Board has acted arbitrarily, may its discretion . . . be overridden"); *Parke, Austin & Lipscomb v. FTC*, 142 F.2d 437, 442 (2d Cir. 1944); *NLRB v. Botany Worsted Mills*, 133 F.2d 876, 880 (3d Cir. 1943); *Penn Anthracite Mining Co. v. Delaware & H.R. Corp.*, 16 F. Supp. 732, 737 (D. Pa. 1936) ("It is our function to protect litigants from arbitrary and capricious exercise of authority"); *NLRB v. Clarksburg Pub. Co.*, 120 F.2d 976, 980 (4th Cir. 1941); *NLRB v. Ed. Friedrich, Inc.*, 116 F.2d 888, 889 (5th Cir. 1940); *General Tobacco & Grocery Co. v. Fleming*, 125 F.2d 596, 599 (6th Cir. 1942) (court "should not become a mere rubber stamp for the approval of arbitrary action"); *Williams v. Bowles [OPA]*, 56 F. Supp. 283, 284 (W.D. Ky. 1944); *Schreiber v. United States [Postmaster General]*, 129 F.2d 836, 839 (7th Cir. 1942); *Valley Mould & Iron Corp. v. NLRB*, 116 F.2d 760, 764 (7th Cir. 1941) (may interfere where action "is arbitrary . . . where there is abuse of discretion"); *Pittsburgh Plate Glass Co. v. NLRB*, 113 F.2d 698, 701 (8th Cir. 1940) ("conclusive, unless arbitrary or capricious"). In the 9th Circuit, *Markall v. Bowles*, 58 F. Supp. 463, 465 (N.D. Cal. 1944), stated: "[U]nder general principles of jurisprudence the right of appeal to the courts in the case of administrative action of an arbitrary or capricious nature is established."

12. "[O]ur age," states Professor Jaffe, "has produced elsewhere, and even on occasion in our own country, the most monstrous expressions of administrative power." Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 405 (1958). "The discretion of a judge is said by Lord Camden to be the law of tyrants In the best it is often times caprice; in the worst, it is every vice, folly, and passion to which human nature is liable," as the infamous example of Chief Justice Jeffreys should remind us. BOUVIER'S LAW DICTIONARY, "Discretion." Quoting an earlier dissenting opinion of Justice Douglas, the Supreme Court stated: "[U]nless we make the requirements of administrative action strict and demanding, *expertise* . . . can become a monster which rules with no practical limits on its discretion." *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (emphasis in original). "A government which . . . held the lives, the liberty, and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic depositary of power is after all but a despotism." *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1876).

13. For an unrestricted statutory mandate Mr. Saferstein would substitute a "threshold inquiry" in every case, not merely in the former "exceptional" case, to determine whether review should be allowed. The factors to be considered in making such threshold

which Mr. Saferstein airily skips in reliance on the Davis "solution,"¹⁴ that is controlling.

I. The Face of the Statute

As enacted,¹⁵ Section 10 of the Administrative Procedure Act provided:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— . . . (e) . . . the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law¹⁶

The central issue is whether the Section 10(e) directive to set aside arbitrary action is curtailed by the introductory second exception for action "committed to agency discretion."

Both "discretion" and "abuse of discretion" were terms of settled meaning at the time the APA was drafted. Courts had long said that discretion "means a sound discretion, that is to say, a discretion exercised not arbitrarily."¹⁷ Given the fact that "delegated power, of course,

determinations are, Mr. Saferstein asserts, "the interest in fostering the most creative and efficient use of limited agency resources," "the interest in the most efficient allocation of the resources of the federal courts," and the interest of "the individuals seriously enough affected by the agency's action to have standing to challenge its validity," Saferstein 371. Except where Congress has clearly provided for or against review of a particular agency action, Mr. Saferstein claims,

the courts must undertake the difficult task of canvassing the effects of judicial review upon the two institutions involved, and then determining whether the adverse effects upon either institution are justified by the extra protection that might be afforded by review to the complaining individuals.

Id. 372. *But see* Wong Wing Hang v. Immigration & Naturalization Service, 360 F.2d 715, 718 (1966) (Friendly, J.) ("[O]nly in the rare—some say nonexistent—case . . . may review for 'abuse' be precluded").

14. Saferstein 367 n.3, 374 n.32. Were the statute truly ambiguous, were its legislative history obscure or unenlightening, or were constitutional compulsions absent, Mr. Saferstein's "functional analysis" might conceivably offer some guidance. In the circumstances, however, his "functional" criteria cannot displace what the statute and the Constitution clearly require.

15. Administrative Procedure Act § 10, 60 Stat. 243 (1946). The Act was codified in 1966; Section 10 now appears in 5 U.S.C. §§ 701-06 (Supp. III, 1968), in the following slightly modified form.

. . . except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law . . . [t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

16. 60 Stat. 243 (1946).

17. *United States v. Davis*, 202 F.2d 621, 625 (7th Cir. 1953); *Smaldone v. United States*, 211 F.2d 161, 163 (10th Cir. 1954); *Langnes v. Green*, 282 U.S. 531, 541 (1931): "When invoked as a guide to judicial action [discretion] means a sound discretion . . . a

may not be exercised arbitrarily,"¹⁸ "*abuse of discretion*" is necessarily excluded from the compass of a grant of "*discretion*." The point cannot be sufficiently stressed. An arbitrary finding "is outside the administrative discretion conferred by the statute";¹⁹ an officer "exceeds his authority by making a determination which is arbitrary or capricious";²⁰ discretion simply "does not extend to arbitrary and unreasonable action."²¹ "Arbitrary" or "capricious" action—terms used interchangeably with "*abuse of discretion*"²² and coupled with it in Section 10(e)—may be defined as action unreasonable in the circumstances.²³ In judicial usage, "*abuse of discretion*" was and remains the antithesis of "*reasonable*" action or "*sound*" discretion.

This traditional antithesis is expressed on the face of the statute: "*discretion*" is by the second exception exempted from review, whereas Section 10(e)—which as enacted was headed "*Scope of review*"—directs that courts shall set aside action found to be an "*abuse of discretion*." Implicit in that directive under "*Scope of review*" is the postulate that there is a "*Right of Review*" of arbitrariness which is unaffected by the exception for "*discretion*."²⁴ Otherwise, saving Professor Davis's tor-

discretion exercised not arbitrarily." This was Lord Mansfield's definition, *see* note 38 *infra*. Professor Davis ridicules this "interpretation":

The cornerstone of [Berger's] argument about interpreting the APA is his proposition, repeatedly asserted, that "*discretion*" and '*abuse of discretion*' are opposites." My opinion is that of the three categories—(1) exercise of discretion, (2) proper exercise of discretion, and (3) abuse of discretion—the second and third are opposites but the first and third are not. Berger's view that the first and third are opposites is something like saying that animals and male animals are opposites.

Davis, *Not Always* 647. Nevertheless, "A reasonable determination is the antithesis of one which is arbitrary," *Dooley v. Highway Truckdrivers & Helpers*, 192 F. Supp. 193, 200 (D. Del. 1961). On Professor Davis's reasoning, one might argue that male and female are the same because both contain the word "male."

18. *FCC v. Schreiber*, 381 U.S. 279, 292 (1965).

19. *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 719 (2d Cir. 1955).

20. *Dismuke v. United States*, 297 U.S. 167, 172 (1936).

21. *Newton v. Consol. Gas Co.*, 259 U.S. 101, 105 (1922). *Fox Film Corp. v. Trumbull*, 7 F.2d 715, 727 (D. Conn. 1925) ("The use of the words 'within the discretion of the commission' does not import absolute or capricious discretion").

22. "[A]buse of discretion" is "arbitrary action not justifiable" in the circumstances. *NLRB v. Guernsey-Muskingum Elec. Co-op, Inc.* 285 F.2d 8, 11 (6th Cir. 1960). "Discretion . . . is abused when the judicial action is arbitrary," *quoting* *Hartford Empire Co. v. Obear-Nester Glass Co.*, 95 F.2d 414, 417 (8th Cir. 1938); *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942); *Western Air Lines, Inc. v. CAB*, 184 F.2d 545, 551 (9th Cir. 1950). *See also* *Gonzalez v. Freeman*, 334 F.2d 570, 580 (D.C. Cir. 1964) ("because arbitrary and capricious . . . , hence an abuse of discretion"); *Valley Mould & Iron Corp. v. NLRB*, 116 F.2d 760, 764 (7th Cir. 1940); *In re Berry & Moser Construction Co.*, 114 F. Supp. 449, 452 (D. Me. 1953).

23. *See* *NLRB v. Guernsey-Muskingum Elec. Co-op, Inc.*, 285 F.2d 8 (6th Cir. 1960). Judge Friendly said that arbitrary or unreasonable action "is another way of saying that discretion is abused only where no reasonable man could take the view." *Wong Wing Hang v. Immigration & Naturalization Service*, 360 F.2d 715, 718 (2d Cir. 1966), *quoting* *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942).

24. To Professor Jaffe this seems to require no argument: "The further provisions of the judicial review section [Section 10(e)] make it clear that the mere presence of agency

tured "solution," of which more below, the directive is unintelligible—Congress did not direct an overturn of action which but a few sentences earlier it had "excepted" from review. Nor was this an oversight, for, as will appear, the legislators gave unmistakable expression to their intention to make arbitrariness unqualifiedly reviewable. If we give to the statutory words the meaning given them by the courts—as we must under the rule that when an Act employs words which had acquired a "fixed meaning through judicial interpretations," "they are used in that sense unless the context requires the contrary"²⁵—the exception of "discretion" from review shielded "sound" discretion only; it in no wise exempted the antithetical "abuse of discretion" from the review expressly directed by Section 10(e).

To fill out the setting, Section 10(a), entitled "Right of Review," provides, roughly speaking, that any person "adversely affected or aggrieved" by agency action "shall be entitled to judicial review thereof."²⁶ Arbitrariness, Professor Davis concedes, is not authorized by the Constitution,²⁷ and, in the words of Section 10(e), it is "not in accordance with law." Consequently arbitrary action constitutes an infringement of due process in the basic sense of not being "in accordance with law";²⁸ and one who is "adversely affected" by such conduct has a "Right of Review" unless it can be maintained that Congress intended to insulate unconstitutional action from review.²⁹

This analysis is reinforced by a number of considerations. A reading of "discretion" to include every exercise of discretion—"sound" or not—is manifestly absurd, because all agency action involves the exercise of discretion.³⁰ Self-evidently Congress did not intend to make all

discretion does not oust review. Under the heading 'Scope of Review' an agency action may be set aside for 'an abuse of discretion,' which clearly implies reviewability despite the presence of discretion." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 374 (1965).

25. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939). *See also* *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911); *Kepner v. United States*, 195 U.S. 100, 124 (1904).

26. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1946), *now* 5 U.S.C. § 701 (Supp III, 1968).

27. *See* p. 981 *infra*.

28. *See* p. 983 *infra*.

29. *See* quotation from Senate and House Reports in note 148 *infra*, and compare Professor Davis' statements, note 30 and p. 974 *infra*.

30. In *Homovich v. Chapman*, 191 F.2d 761, 764 (D.C. Cir. 1951), the court rejected a claim by the Secretary of the Interior that by virtue of the second exception "there can be no review where agency action 'involves' discretion or judgment. Obviously the statute does not mean that; almost every agency action 'involves' an element of discretion or judgment." *See also* *Adams v. Witmer*, 271 F.2d 29, 33 (9th Cir. 1959). Mr. Saferstein is in accord. Saferstein 382. Professor Davis is quite clear that "nothing in the legislative history supports an intent to deprive courts of all power to correct any abuse of discretion." Davis, *Supplement* 21. Indeed, nothing in the legislative history supports an intent to deprive courts of all power to correct any abuse of discretion. Professor Davis

agency action unreviewable, including action that is in excess of statutory jurisdiction or unconstitutional, for Section 10 specifically orders such action to be set aside. So much even Professor Davis accepts.³¹ Powerful evidence of a legislative intention to exclude "abuse of discretion" from the scope of the exception for "discretion" is furnished by the face of the statute itself. In striking at action that is "arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*," Section 10(e) clearly implies that "abuse of discretion" is "not in accordance with law." The second exception, it must be remembered, shields only action "*by law* committed to agency discretion." Plainly Congress did not mean "by law" to commit to agency discretion action which it immediately branded as "not in accordance with law." "Abuse of discretion" is therefore patently excluded from the ambit of the exception for "discretion," and that exception consequently in no way limits the Section 10(e) directive.³²

The difficulties that Professor Davis experiences with Section 10 spring in considerable part from a refusal to accept that even "discretion" must be subject to preliminary review so as to screen permissible from impermissible action.³³ As Professor Jaffe points out, discretion is definable as "a power to make a choice within a class of actions. Despite such discretion, normally a court will review an agency's choice in order to determine whether it is within the permissible class of

can point to no such history, and in fact disclaims reliance on the history. See p. 976 *infra*. We need to remember that "[t]he whole point of the jurisdiction to control administrative action is that it *does* apply to discretionary power. For it can hardly apply to anything else." Wade, *Anglo-American Administrative Law: More Reflections*, 82 L.Q. Rev. 226, 252 (1966).

31. See note 30 *supra*, & p. 974 *infra*.

32. Although the statutory juxtaposition of "by law" and "not warranted by law" badly shakes Professor Davis's "solution," he has yet to attempt an explanation of this statutory bar to his view. Instead he asserts, "The Supreme Court unanimously says precisely the opposite"—sweet are the uses of "precisely"—of my "main position" that "the second exception of section 10 does not curtail the section 10(e) directive to set aside 'abuse of discretion.'" For "precisely the opposite" he cites the statement in *Panama Canal Co. v. Grace Lines*, 356 U.S. 309, 317 (1958), that "Section 10 of the Administrative Procedure Act . . . excludes from the categories of cases subject to judicial review 'agency action' that is 'by law committed to agency discretion.'" Davis, *Not Always* 643. Again the omnipresent Davis assumption that a bar to review of "discretion" *ipso facto* constitutes a bar to review of its abuse. *Panama* posed no "abuse" problem; there was no occasion to consider and the Court did not consider the effect of the "discretion" exception upon the Section 10(e) directive to set aside "abuse of discretion." "At heart," said the Court, the conflict was over "problems of statutory construction and cost accounting . . . on which the experts may disagree." 356 U.S. at 317. Where reasonable men may disagree a decision either way cannot be arbitrary. *Yankee Network v. FCC*, 107 F.2d 212, 226-27 (D.C. Cir. 1939); see *FCC v. Schreiber*, 381 U.S. 279, 292 (1964); *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942). And this is transformed into a holding which "says precisely the opposite" of my position." See also the post-*Panama* cases cited in notes 145 & 148 *infra*.

33. See the quotation from Professor Davis at p. 972 & note 40 *infra*.

actions.”³⁴ In judicial phraseology, the “reviewing court must satisfy itself that the administrative decision has a ‘rational’ or ‘reasonable’ foundation in law.”³⁵

Refusal to accept this function leads Professor Davis to dismiss an illuminating bit of legislative history. Chairman McCarran had said that “the thought uppermost in presenting this bill [the APA] is that where an agency without authority or by caprice makes a decision, then it is subject to review.” Senator Donnell then sought confirmation for his deduction that the mere vesting of discretion “is not intended” to preclude review in the event a party “claims there has been an abuse of discretion.” McCarran replied, “It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.”³⁶ Professor Davis comments,

Taking this language at face value would mean that courts would substitute their discretion for administrative discretion; for if discretion must be “based on sound reasoning,” reviewing courts may determine what is “sound.”³⁷

Beyond doubt reviewing courts “may determine what is ‘sound’ ”; that is exactly what discretion has meant from Coke onwards³⁸ and what

34. L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 359 (1965). “[A]dministrative discretion encompasses any number of policy decisions which can be supported by a given set of ‘substantial’ factual data. Within that range [the administrator’s] conclusions may not be judicially tampered with.” But the court may inquire “whether the order is a rational conclusion and not so ‘unreasonable’ as to be capricious, arbitrary or an abuse of discretion.” *Willapoint Oyster v. Ewing*, 174 F.2d 676, 695 (9th Cir. 1949). “The Commission must exercise its discretion . . . within the bounds . . .,” and the courts will “determine whether the agency has done so,” and will inquire whether there is a “rational connection between the facts found and the choice made.” *Burlington Truck Lines v. United States*, 371 U.S. 156, 167, 168 (1962). *Marlin-Rockwell Corp. v. NLRB*, 116 F.2d 586, 587 (2d Cir. 1941) (“so unreasonable or capricious as to pass the bounds of permissible discretion”).

35. *Grace Line v. Federal Maritime Bd.*, 263 F.2d 709, 711 (2d Cir. 1959). See also *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87 (1934); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962) (review “limited to consideration of whether it [the order] has a rational basis”); *NLRB v. Jas. H. Matthews & Co.*, 342 F.2d 129, 131 (3d Cir. 1965) (order arbitrary “where it is not supportable on any rational basis”). This was tied into Section 10(e) in *Louisville & Nashville R.R. v. United States*, 268 F. Supp. 71, 75 (W.D. Ky. 1967) (“An order is arbitrary within the meaning of the APA if it lacks a stated rational basis”).

Judge Prettyman has declared that the courts will “insure that the agency stays within the bounds of reason and outside the realm of caprice . . .” *North Central Airlines, Inc. v. CAB*, 265 F.2d 581, 584 (D.C. Cir. 1959).

36. S. Doc. No. 248, at 311.

37. 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 28.08, at 39 (1958) [hereinafter cited as DAVIS, *TREATISE*]. Mr. Saferstein follows in Professor Davis’s footsteps when he charges me with misreading “committed to agency discretion” as “committed to a reasonably exercised discretion.” Saferstein 373.

38. In *Rooke’s Case*, 77 Eng. Rep. 209, 210 (C.P. 1599), the Commissioners of Sewers had been empowered to act according “to their discretions,” and Coke declared: “[Y]et their proceedings ought to be limited and bound with the rule of reason and law.” Lord Mansfield stated, “[D]iscretion . . . means sound discretion guided by law . . . it must not

is expressed in the judicial inquiry whether "the administrative decision has a 'rational' or 'reasonable' foundation." Although Professor Davis has distinguished in another context between review of reasonableness and review of the wisdom of choices within the area of discretion,³⁹ he overlooks in the present context the distinction between a determination that a particular action falls outside a permissible class of actions, and a determination that on all the facts the action, even if unwise, is reasonable and within the permissible class. The Section 10 exception from review of action "by law committed to agency discretion" should thus be read as requiring a threshold inquiry very different from that proposed by Davis and Saferstein: an inquiry to determine whether the challenged action falls inside or outside the limits of reasonable discretion. If it falls inside, the court's inquiry stops; if it falls outside, the court proceeds with review on the merits as directed by Section 10(e). Whether agency action has a "rational" basis is and must be open to inquiry;⁴⁰ and while courts

be arbitrary." *Rex v. Wilkes*, 98 Eng. Rep. 327, 334 (1770). The House of Lords in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 694, emphatically rejected the Minister's claim that broad statutory terms gave him "unfettered discretion." Lord Upjohn stated that even had Parliament employed the adjective "unfettered," it could "do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully." *Id.* at 719. For valuable discussion, see Wade, *The Myth of Unfettered Discretion*, 84 L.Q. Rev. 166 (1968).

In the words of Judge Jerome Frank, "Courts have no power to review administrative discretion when it is reasonably exercised . . . [but] they can compel correction of an abuse of discretion." *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (2d Cir. 1950).

39. In discussing judicial review of legislative rule-making, where insulation of administrative power is at its apogee, he states: "In reviewing a legislative rule a court is free to make three inquiries: (1) whether the rule is within the delegated authority, (2) whether it is reasonable . . . But the court is not free to substitute its judgment as to the desirability or wisdom of the rule . . ." 1 DAVIS, *TREATISE* § 5.05, at 315.

40. It has been said that "what is irrational is unconstitutional." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 86 (1962); *Allis Chalmers Mfg. Co. v. NLRB*, 162 F.2d 435, 439 (7th Cir. 1947) ("[P]rovided the Board exercised that discretion reasonably, its determination is binding upon us"). See also note 35 *supra* & note 41 *infra*.

To obscure this simple point Professor Davis engages in a scholastical *tour de force*, stamping my analysis as one of my "major misunderstandings":

Although Mr. Berger's main position is that (1) the courts should always review abuse of discretion or arbitrariness, he couples that with the idea that (2) discretion should often "remain unreviewable." These two propositions, in my opinion cannot possibly be adopted either by Congress or by the courts, because whenever a party falsely alleges abuse of discretion, the court cannot escape violation of either the first proposition or the second. If it does not inquire whether discretion has been abused, it violates the first, and if it does inquire, it reviews the exercise of discretion, thus violating the second. Mr. Berger's main position seems to me as logically impossible as a square circle.

Davis, *Not Always* 647. To think that all judicial inquiries whether the exercise of discretion has a "rational" basis represent squaring the circle! Professor Davis would befog a simple point by verbal juggling of the many-hued word "review." Of course a court must preliminarily "review" discretionary action to determine whether it has a "rational" basis and represents "sound" discretion, or was arbitrary and an "abuse of discretion." Given absence of "abuse," inquiry halts and "review" of the "wisdom" of the choice is rejected. This is all that "unreviewable discretion" means, as my earlier citations attest.

will not "substitute their judgment" where they find a "rational" basis for the administrative choice, they have made amply plain that arbitrary action does not sail under that flag.⁴¹

II. The Davis "Solution"

For Professor Davis the juxtaposition of "discretion" with "abuse of discretion" engenders a "difficult problem"⁴²:

The literal language says that a court shall set aside an abuse of discretion except so far as the agency may exercise discretion. But this makes neither grammatical nor practical sense, for the exception consumes the whole power of the reviewing court.⁴³

But Section 10, as the Supreme Court said in a similar case, "is clear when its words are given their commonly accepted import."⁴⁴ Read in accordance with judicial usage, "discretion" or "reasonable" action does not "consume the whole power of the reviewing court," and it makes both "grammatical" and "practical sense" in conjunction with "abuse of discretion" or unreasonable action. Moreover, no confusion, grammatical or practical, exists between the exception for "discretion" and the direction to set aside "arbitrary, capricious" action. Still less are, or can be, the other Section 10(e) categories "consumed by" the exception. Who would argue that the exception for "discretion" rendered courts powerless to set aside action "(2) contrary to constitutional right . . ."?⁴⁵ How can the exception affect only the words "abuse

41. *United States v. Pierce*, 327 U.S. 515, 536 (1946): "Unless in some specific respect there has been . . . abuse of the Commission's discretion, the reviewing court is without authority to . . . substitute its own view concerning what should be done . . ." So too, *NLRB v. Muskingum Elec. Co-op, Inc.*, 285 F.2d 8, 11 (6th Cir. 1960), distinguished the "substitution of judgment" from inquiry whether the "circumstances clearly show an abuse of discretion." Speaking with reference to Section 10(e), *Jenkins v. Macy*, 237 F. Supp. 60, 62 (D. Mo. 1964), stated: "[A]s long as the administrative agency . . . had a sound basis for the decision made, and the decision was not arbitrary . . . then the courts will not substitute their own decision . . ." *Williams v. Bowles*, 56 F. Supp. 283, 284 (D. Ky. 1944) (court "has no authority to substitute its judgment . . . so long as the ruling is not [arbitrary]"). See also *Automobile Sales Co. v. Bowles*, 58 F. Supp. 469, 471 (D. Ohio 1944); *Borden Co. v. Freeman*, 256 F. Supp. 592, 602 (D.N.J. 1966).

42. Davis, *Postscript* 825, quoted note 1 *supra*.

43. Davis, *Supplement* 21.

44. *United States v. Wurts*, 303 U.S. 414, 417 (1938).

45. "An agency may not finally decide the limits of its statutory power," *Social Security Bd. v. Nierotko*, 327 U.S. 358, 369 (1946); far less the constitutionality of its actions.

Whether Professor Davis adheres to his rejection of a reading that "consumes the whole power of the reviewing court" is by no means clear. His last word was that "the literal reading" of the "except" clause is always used in any combination other than with the "abuse of discretion" phrase. The literal reading is used in combination with (a), (b), (c), (d), and all parts of (e) except the "abuse of discretion phrase." Davis, *Not Always* 650 n.11. By "literal reading" he means one opposed to mine, e.g., "Mr. Berger wants to interpret away the 'except' clause. The courts uniformly give full effect to the literal words

of discretion" and leave all the rest of Section 10(e) untouched?⁴⁶ A reading which entails such irrational consequences must be summarily dismissed.

Whether the entirely verbal affinity between "discretion" and "abuse of discretion" gives way to the antithetical meaning given the terms by the courts, or is disregarded because to read discretion "literally" would "consume the whole power of the reviewing court," in either case Professor Davis's "difficult problem" vanishes. His "solution" is not dictated by logical or practical necessity but by his desire to carve out an exception from the unqualified directive of Section 10(e) for such cases as he considers "intrinsically unsuited" to review.⁴⁷ To accomplish this he redefines the word "committed," ordinarily defined as "entrusted to": if action is "committed" to agency discretion, he says, it is "unreviewable," if it is "unreviewable" it is "committed"—in the context of Section 10 "the two words have the same meaning."⁴⁸ This arbitrary redefinition of a statutory term to suit his purposes is without a leg to stand on.⁴⁹

Besides the logic of the statute and traditional judicial usage, there are other considerations which militate against the Davis "solution." The Supreme Court has stated that exemptions from the APA—here from the express Section 10(e) directive—"are not lightly to be presumed."⁵⁰ In addition there is the "presumption that arbitrariness is *reviewable* unless there is 'evidence to the contrary' that Congress

of the 'except' clause." Davis, *Supplement* 17. Can he mean that "literally" the exception for "discretion" forecloses review, for example, of Section 10(e)(2) action "contrary to constitutional right?" See Appendix note 14 *infra*.

46. See Appendix note 14 *infra*.

47. "[M]uch administrative discretion is intrinsically unsuited to judicial review." Davis, *Supplement* 25.

48. The main idea is to emphasize the word "committed." So far as the action is by law "committed" to agency discretion, it is not reviewable, even for arbitrariness or abuse of discretion; it is not "committed" to agency discretion to the extent that it is reviewable. This means that the two concepts "committed to agency discretion" and "unreviewable" have in this limited context the same meaning. Both depend upon the statutes and the common law. To the extent that "the law" cuts off review for abuse of discretion, the action is committed to agency discretion. The result is that the pre-act law on this point continues.

Davis, *Postscript* 825.

49. His redefinition is not, however, altogether without precedent: "'When I use a word,' Humpty-Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" L. CARROLL, *THROUGH THE LOOKING GLASS* ch. 6. But the "plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense." *Lynch v. Alworth-Stephens Co.* 267 U.S. 364, 370 (1925); see *Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932).

50. *Brownell v. Tom We Shung*, 352 U.S. 180, 185 (1956). Then too, "However inclusive may be the general language of a statute it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . Specific terms prevail over the general." *Fourco Glass Co. v. Transmirra Products Co.*, 353 U.S. 222, 228-29 (1957).

'wished to close the door.' " Professor Davis states, "This is my position too,"⁵¹ as well he may, for the presumption bears the imprimatur of the Supreme Court: "only upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review."⁵² Since he confessedly does "not base [his] position upon the legislative history," but "upon an effort to find a sound solution";⁵³ since, in his own words, his "solution" is no more than "a practical interpretation which will carry out the probable intent";⁵⁴ since he now concedes, "I do not say that the statutory words require my interpretation. Nor do I say that the legislative history must be interpreted my way";⁵⁵ and since he claims no more than that "taken as a whole, [the legislative history] is not inconsistent with my solution";⁵⁶ where is the "clear and convincing" congressional "evidence to the contrary" which alone can rebut the presumption for review and "close the door" to review?⁵⁷

In fact, Professor Davis's reading of "committed" is inconsistent with the legislative history.⁵⁸ Let me dwell at this juncture only on materials which bear directly on the word "committed." Early in the legislative process there was concern whether the "committed" phrase made it clear that *only* "abuse of discretion *granted by law*" was reviewable,⁵⁹ exhibiting, first, an understanding that "committed" merely

51. Davis, *Postscript* 830 n.35.

52. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

53. Davis, *Postscript* 828.

54. *Id.* 825.

55. *Id.*

56. *Id.* 828. Before he was called to account, he asserted that the "words of the Act, after all, are clear, unambiguous, and unequivocal"; that "the strongest part" of the legislative history supported his reading; that the second exception was "a clear expression of Congress in favor of preventing review"; and that "the courts uniformly read this provision literally, because they believe that Congress intended what it so clearly said." Davis, *Supplement* 19, 18, 25. His was "the orthodox interpretation of § 10." *Id.* 24. Since then he has returned to his original view, saying: "The Berger interpretation of the APA has nothing against it except the clear statutory words . . ." Davis, *Not Always* 644. See also Appendix note 14 *infra*.

57. See also note 6 *supra*. In addition, one who would cut down the plain Section 10(e) directive labors under a heavy burden. As Chief Justice Marshall said: "[I]f the plain meaning of a provision . . . is to be disregarded, because we believe that the framers of the instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be . . . monstrous . . ." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-03 (1819). "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." *Martin v. Hunters' Lessee*, 14 U.S. (1 Wheat.) 304, 338-39 (1816) (Story, J.).

58. See pp. 978-79 *infra*.

59. Emphasis added.

It is proposed that the phrase "by law committed to agency discretion" might be clarified to indicate that judicial review is conferred only to correct an "abuse of discretion granted by law." So far as necessary, the matter may be explained by committee report.

S. Doc. No. 248, at 36.

meant "granted," its traditional meaning, and second, an understanding that discretion "granted [*i.e.*, "committed"] by law" might be abused and would then be reviewable. The leading Senate proponent of the APA, Chairman McCarran, explained shortly after enactment that "committed by law" means, "of course, that claimed discretion must have been intentionally given to the agency by the Congress, rather than assumed by it." "Abuse of discretion," he continued, "is expressly made reviewable" by Section 10(e).⁶⁰ In short, "by law committed" simply means "granted" or "entrusted with,"⁶¹ not "unreviewable," as is confirmed by the face of the statute: "discretion" "*by law committed*" cannot comprehend "abuse of discretion," which Congress stamped as "not in accordance with law."⁶²

The Davis "solution" suffers from yet another infirmity, deriving from the fact that it "depend[s] upon statutes and the common law."⁶³ He cites no case which does not turn on an interpretation of a statutory grant of administrative jurisdiction, and his assertion of a "common law" of nonreviewable arbitrariness boils down to judicial constructions of such statutory grants.⁶⁴ But if a statute expressly bars review, the matter is covered by the first exception of Section 10 for cases in which "statutes preclude review"; and if judicial construction of a statute bars review, this is "inexplicit" preclusion which is also covered by the first exception.⁶⁵ Consequently a construction of the second exception to preserve statutes which (allegedly) preclude review of arbitrariness is supererogatory. Professor Davis's argument that there is an "overlap" between the first and second exceptions⁶⁶ not only

60. McCarran, *Improving "Administrative Justice": Hearings and Evidence; Scope of Judicial Review*, 32 A.B.A.J. 827, 831 (1946).

61. This normal employment of "committed" is also found in *Wilson v. State Board of Examination*, 228 Mich. 25, 27, 19 N.W. 643, 644 (1924): to such Boards is "committed the exercise of a sound discretion, but to them is not committed the exercise of an arbitrary will." In *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950), the court said: "The question of a proper unit . . . is committed to the wide discretion of the Board. The Board's determination . . . will not be disturbed by the courts unless clearly arbitrary and unreasonable."

62. See p. 971 *infra*.

63. See note 48 *supra*.

64. Compare his "when another statute is doubtful as to reviewability, the APA may assist in an interpretation in favor of reviewability." Davis, *Supplement* 24.

65. Professor Davis describes *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), as "the most important case holding that a statute inexplicitly precluded review" under the first exception. 4 DAVIS, *TREATISE* § 28.09, at 42.

66. Davis, *Not Always* 652 n.30. Professor Davis persists in maintaining that the "two exceptions clearly overlap," *id.*, without taking account of my demonstration that his view is untenable. Berger, *Sequel* 622-23, 628-30. Reiteration without refutation smacks of papal infallibility.

The first exception preserves existing statutes such as the Veterans Administration Act, which provides in certain cases that no court shall have jurisdiction to review. See p. 993 *infra*. The second exception merely insures that a sound exercise of discretion shall

attributes to Congress special anxiety to shield selected arbitrariness from review, for which there is not a shred of evidence in the legislative history,⁶⁷ but also establishes a perplexing dual set of standards for reviewability. The test of nonreviewability under the first exception is stated by the House Report: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must *upon its face* give clear and convincing evidence of an intent to withhold it."⁶⁸ The proposed Davis test under the second exception is whether the function in question is "intrinsically unsuited" for judicial review.⁶⁹ Professor Davis maintains that "nothing of substance hinges on the classification" between the first and second exceptions,⁷⁰ but he has yet to explain why in that case Congress should have provided two disparate standards of review, unaccompanied by clues as to the governing standard for a case of "overlapping."

III. The Legislative History

We have seen Chairman McCarran's assurance to Senator Donnell that grants of "discretion" were "not intended" to preclude review of arbitrariness, his subsequent explanation of "committed to discretion" in terms of grant, and his statement that "abuse of discretion is expressly made reviewable by Section 10(e)."⁷¹ In the House, Chairman Walter said of the discretion of administrative agencies: "They do not have the authority *in any case* to act blindly or arbitrarily."⁷²

remain unreviewable; it does not provide that arbitrariness shall not be reviewable, nor that the court is without *all* jurisdiction in the premises. Professor Davis argues, "Whenever a statute cuts off review of a discretionary determination, I think the statute precludes review . . ." Davis, *Not Always* 652 n.30. This is to reason that because apples and oranges are both fruit they are therefore identical. Since every agency is created by statute and must of necessity have discretion, whether or not conferred in terms, it follows in the Davis lexicon that every statute must prevent review. On that analysis the first exception is supererogatory. If, on the other hand, we adopt Professor Davis's reading of "committed to discretion" as providing for selective unreviewability by virtue of prior statutes such situations would be covered by the first exception, because a "statute precludes review." It is a common-place that one avoids constructions that result in surplusage or tautology. *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F.2d 166, 172 (8th Cir. 1938).

67. Professor Davis himself states that "of course, everyone, including every court, shares Mr. Berger's opposition to administrative arbitrariness." Davis, *Supplement* 17.

68. S. Doc. 248, at 275. See also Chairman Walter's explanation, quoted in note 6 *supra*.

69. Davis, *Supplement* 25.

70. Davis, *Not Always* 652 n.30. Compare Mr. Saferstein: "there is little to be gained by attempting to distinguish between the committed-to-agency-discretion doctrine and the second [actually the first] nonreviewability exception codified in § 10 . . . where 'statutes preclude judicial review.'" Saferstein 377 n.43.

71. See pp. 972, 977 *supra*.

72. S. Doc. No. 248, at 368 (emphasis added). Another spokesman for the bill, Congressman Springer, in explaining the purpose of the Section 10(e) provision stated:

In those cases where these decisions are found to be arbitrary, where the decision is

Consider Professor Davis's comment on Walter's explanation of the APA:

However reasonable this proposition may seem, if it means that courts may always set aside blind or arbitrary action, it is inconsistent with tradition and with the unambiguous words of the Act providing for review "except so far as . . . agency action is by law committed to agency discretion."⁷³

Since Professor Davis no longer claims that the "exception" is "unambiguous,"⁷⁴ we may turn to his "tradition." He himself has said that "Congress has power within reasonable limits to determine" "what administrative action shall be reviewable"; and it can scarcely be maintained that an Act which implements the "laudable purpose" of "reducing injustice by allowing the courts to correct administrative arbitrariness or abuse of discretion"⁷⁵ is unreasonable. Congress may supplant either the common law or a "tradition" by statute; the only question is whether it has expressed its intention to do so. For that expression we have the truly "unambiguous" Section 10(e) directive to set arbitrariness aside, amplified by Chairman Walter's statement that it was applicable "in any case," and Congressman Springer's statement that the directive expressed a "sound philosophy."⁷⁶ Whatever the scope of the alleged "tradition," the first duty of the courts is to give effect to the plain terms of the statute, particularly since they are confirmed by a clear legislative history.⁷⁷

Originally Professor Davis charged me with ignoring "the strongest part" of the legislative history which allegedly "supports [his] literal reading";⁷⁸ but he has retreated from this position. Now his purpose in presenting "the legislative history opposed to Mr. Berger's position . . . is not to show that it leads to a conclusion against Berger," but

found to be capricious or an abuse of discretion or otherwise not in accordance with the law, the decision can be set aside. That is certainly fair, that is certainly equitable, and is certainly based upon a sound philosophy.

S. Doc. No. 248, at 377. To carve out exceptions from the "sound philosophy" of the general rule more is needed than vague references to an intention to "preserve discretion." See Appendix, pp. 1001-1003 *infra*.

73. 4 DAVIS, TREATISE § 28.08, at 39.

74. See p. 976 *supra*.

75. Davis, *Supplement* 25.

76. See note 72 *supra*.

77. The House Report alone would refute Mr. Saferstein's "doctrine" of "refusal to hear an allegation" of arbitrariness, Saferstein 368 n.5 (emphasis added): "In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein." S. Doc. No. 248, at 275 (emphasis added). In other words, the second exception does not bar a "hearing" of charges of arbitrary conduct even though the litigant may fail to establish arbitrariness "therein."

78. Davis, *Supplement* 18.

merely to "show that it is conflicting." Now the legislative history invoked by him merely "seems to [him] rather substantial, just as the legislative history in support of Mr. Berger's position is rather substantial."⁷⁹ In fact, his selective unreviewability gloss finds no support in the history. The excerpts he invokes merely amount to this: "by law committed" means "by law committed" and nothing more; "discretion" must be "preserved."⁸⁰ Of course "discretion" must be preserved; but where is one scrap of evidence that some "abuse of discretion" must be preserved as well? Under established judicial usage "discretion" is "preserved" even though "abuse of discretion" is made reviewable. The legislative history plainly confirms what Section 10 provides: only the exercise of "sound" discretion was sheltered by the second exception; the directive to set arbitrariness aside was left untouched.

IV. Constitutional Requirements

"The most extreme of all Berger positions," says Professor Davis, "is that the Constitution requires review of arbitrariness. No case supports him."⁸¹ Let me summarize some of the cases that I spread before him. A provision that no man shall be deprived of life, liberty or property, said Justice William Johnson in 1819, was "intended to secure the individual from the arbitrary exercise of the powers of government."⁸² There followed cases in which the Court stated that (1) our institutions "do not mean to leave room for the play and action of purely personal and arbitrary power."⁸³ (2) The Constitution condemns "all arbitrary exercise of power."⁸⁴ (3) A state governor's order "may not stand if it is an act of mere oppression, an

79. Davis, *Postscript* 826, 727. Mr. Saferstein echoes that "the legislative history does provide some support for Berger's position, although it appears that many committee members confused nonreviewability with scope of review." Saferstein 374. It is true that the Section 19(e) directive to set arbitrary action aside comes under the head "Scope of Review," but Senator Donnell, for example, required express assurance that review of arbitrariness was unaffected by the exception. See p. 972 *supra*. Unless there is a "Right to Review" of arbitrariness, the directive under "Scope of Review" is without force.

80. See Appendix, pp. 1001-03 *infra*.

81. Davis, *Not Always* 644.

82. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). Justice James Wilson, who was second only to Madison among the Framers, M. FARRAND, *FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 197 (1913), said in 1791: "Every wanton . . . or unnecessary act of authority . . . over the citizen, is wrong, and unjustifiable, and tyrannical." 2 J. WILSON, *WORKS* 393 (Andrews ed. 1896). *Nebbia v. New York*, 291 U.S. 502, 539 (1934), stated that arbitrary control is "an unnecessary and unwarranted interference with individual liberty."

83. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

84. *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 91 (1913).

arbitrary fiat.”⁸⁵ (4) In 1965 the Court declared, “delegated power, of course, may not be exercised arbitrarily.”⁸⁶ (5) The Court has epitomized due process as the “protection of the individual against arbitrary action.”⁸⁷ In an uncontentious moment Professor Davis himself stated, “The requirement of reasonableness stems both from the idea of constitutional due process and from the idea of statutory interpretation that legislative bodies are assumed to intend to avoid the delegation of power to act unreasonably.”⁸⁸ Professor Davis concedes that this is an “impressive collection of Supreme Court statements,” but goes on:

I agree with those statements; I do not see how anyone could disagree with them. But they do not prove that arbitrary exercise of power is always reviewable. One of Mr. Berger's pervasive mistakes is to equate lack of authority to act arbitrarily with judicial reviewability.⁸⁹

The Court is hardly to be charged with idle utterance of noble sentiments which it means to be unenforceable. In fact, after stating that “There is no place in our constitutional system for the exercise of arbitrary power,” the Court went on to say, “if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action,”⁹⁰ as *Yick Wo* had earlier taught in setting

85. Summary of *Sterling v. Constantin*, 287 U.S. 378 (1932), by Justice Cardozo in *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 446 (1935) (dissenting opinion).

86. *FCC v. Schreiber*, 381 U.S. 279, 292 (1965).

87. *Ohio Bell Tel. Co. v. Public Serv. Comm'n*, 301 U.S. 292, 302 (1937); *cf. Dent v. West Virginia*, 129 U.S. 114, 124 (1889): “[T]he great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen.” *Rudder v. United States*, 226 F.2d 51, 53 D.C. Cir. 1955: The government “must not act arbitrarily, for . . . it is subject to the requirements of due process of law.”

88. I DAVIS, *TREATISE* § 5.03, at 299. In fact legislative bodies are without constitutional power to make such delegations. In the *Japanese Immigrant Case*, 189 U.S. 86, 101 (1903), the Court indicated that an Act which vested officials with “absolute arbitrary power” would be unconstitutional. *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886), held unconstitutional an ordinance that conferred a “naked and arbitrary power.” *See also Lewis v. District of Columbia*, 190 F.2d 25 (D.C. Cir. 1951), quoted at note 115 *infra*.

I have found but one departure from such utterances, Chief Justice White's statement in *Dakota Central Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919): “[M]ere excess or abuse of discretion in exerting a power given, it is clear . . . involves considerations which are beyond the reach of judicial power.” His view has been refuted by later Supreme Court practice to the contrary. *See* note 11 *supra*, note 145 *infra*. Today judicial review of arbitrariness is an accomplished fact, as the annotations to Section 10 abundantly testify. 1 FED. PRAC. DIG., *Administrative Law* § 761 (1960).

Professor Davis was in any case ill-advised to cite Chief Justice White, Davis, *Not Always* 644, because he himself rejects total unreviewability of arbitrariness in favor of selective unreviewability, *id.* 646, whereas White would have outlawed all review.

89. Davis, *Not Always* 646.

90. *Garfield v. United States ex rel. Goldsby*, 211, U.S. 249, 262 (1908).

aside an arbitrary ordinance,⁹¹ and as the third case quoted above reiterates. Moreover, the Court has stated that it would not leave an individual "to the absolutely uncontrolled and arbitrary action of . . . [an] administrative officer."⁹² "Where administrative action has raised serious constitutional problems, the Court has assumed that Congress . . . intended to afford those affected by the action the traditional safeguards of due process."^{92a} "To stand between the individual and arbitrary action by the Government," said Justice Jackson, "is the highest function of this Court."⁹³ The "very essence of civil liberty," said Chief Justice Marshall, "certainly consists in the right of every individual to claim the protection of the laws."⁹⁴ Otherwise the protection afforded by due process against arbitrary conduct would be but an empty shell.⁹⁵

In conceding that arbitrary action is indeed unauthorized, Professor

91. See note 83 *supra*.

92. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902). Summarizing the Chinese and Japanese immigration cases, Professor Hart found judicial recognition that a "plenary" power

did not necessarily include a power to be arbitrary or to authorize administrative officials to be arbitrary . . . [and that] the court had a responsibility to see that . . . human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953).

92a. *Green v. McElroy*, 360 U.S. 474, 507 (1959).

93. Statement accompanying a stay of deportation of Mrs. Ellen Knauff, issued as Circuit Justice of the 2d Circuit, May 17, 1950. W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 814 (4th ed. 1960). The role of the Court "in protecting the individual against arbitrary action by the state," is noted by Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 592-93 (1958).

The Framers, said the Court in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 126 (1866), "were guarding the foundations of civil liberty against the abuses of unlimited power"; they sought to protect the "citizen against oppression and wrong." For historical documentation, see R. BERGER, *CONGRESS V. THE SUPREME COURT* 16-21 (to be published; Harvard University Press 1969).

94. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 160 (1803). As the Court said in *United States v. Lee*, 106 U.S. 196, 220 (1882): "It cannot be denied that [the rights of the citizen] were intended to be enforced by the judiciary." "[T]here is no safety for the citizen, except in the protection of judicial tribunals, for rights which have been invaded by the officers of the government . . ." *Id.* at 219. In *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902), the Court said that courts must have the "power . . . to grant relief" to protect against "uncontrolled and arbitrary action." See also *Bradley v. Richmond*, 227 U.S. 477, 483 (1913).

In a suit for the return of property seized by the government as allegedly enemy-owned during World War I, the Supreme Court held that the Trading with the Enemy Act would have been of doubtful constitutionality had it failed to supply an adequate remedy to the non-enemy owner. Constitutional rights *must* be afforded vindication. *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79 (1935).

95. Judge Jerome Frank stated: "It is idle chatter to speak of a legal wrong for which there is no legal redress; a so-called legal right without a legal remedy is . . . but a shabby mythical entity." *Hammond-Knowlton v. United States*, 121 F.2d 192, 205 n.37 (2d Cir. 1941). Quoting Blackstone, Chief Justice Marshall stated: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Davis implies what Section 10(e) makes explicit—that arbitrary action is “not in accordance with law.”⁹⁶ It follows that such action is without “due process of law” in its primal sense:

[W]hen the great barons of England wrung from King John . . . the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by “law of the land” the ancient and customary laws of the English people, or laws enacted by the Parliament, of which the barons were a controlling element.⁹⁷

Injury not authorized by the Constitution is therefore contrary to the “law of the land” and is forbidden by due process.

Next Professor Davis maintains that

[t]hroughout our history, the Supreme Court has held some administrative action unreviewable for arbitrariness or abuse. In the foundation case in 1827, the Court refused to review a finding of fact and declared: “It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse.”⁹⁸

But actual as against possible abuse was something else again, for the Founders looked to the courts to protect the citizen against governmental excesses or “abuse of power”;⁹⁹ and the incautious 1827 statement is repudiated by widespread current review of arbitrariness. But first let us look at Professor Davis’s “foundation case,” *Martin v. Mott*,¹⁰⁰ which involved a statute authorizing the President to call forth the state militia whenever the United States “shall be invaded, or be in imminent danger of invasion.” Understandably the Court refused to review the President’s finding of fact. The most ardent proponent of judicial review must shrink from halting the President to allow lawyers to wrangle over the imminence of an invasion threat. While they squabbled the nation might be overrun. Today we should regard such an issue as a “political question,” of necessity confided to the sole determination of President and Congress. Such extreme cases cannot justify a general “principle” of nonreview of arbitrariness or abuse. Commenting on the twentieth century case of *American School of Magnetic Healing v. McAnnulty*,¹⁰¹ Professor Davis himself states:

96. See pp. 980-81 *supra*.

97. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). I comment below on the exceptional cases which Davis apparently considers as floating in a no man’s land outside the Constitution.

98. Davis, *Not Always* 644.

99. See note 93 *supra* & note 190 *infra*.

100. 25 U.S. (12 Wheat.) 19, 31 (1827).

101. 187 U.S. 94 (1902).

"Instead of saying, as it had said in 1827, that 'it is no answer that such a power may be abused . . .' the Court now assumes that 'arbitrary action' must be judicially corrected."¹⁰² "The common law," he notes, "was evidently changing."¹⁰³

Another case cited by Davis is *Keim v. United States*,¹⁰⁴ wherein the discharge of a government employee was held unreviewable. This case, he states, "is still the foundation of the law concerning the removal of federal employees."¹⁰⁵ Again he himself shakes the authority of his citation: "Even though the Court held in the Keim case of 1900 that discharge of a federal employee was not reviewable, many cases in recent times have held or assumed that such discharges are reviewable."¹⁰⁶

In a third attempt to minimize the "impressive collection of Supreme Court statements" with which he purportedly agrees, Professor Davis invokes *Brotherhood of Railway & Steamship Clerks Association v. Employees Association*,¹⁰⁷ as "[p]erhaps the most important single case against Berger's view that arbitrariness is always reviewable and that the Constitution requires reviewability."¹⁰⁸ In part Professor Davis relies on *Brotherhood* because "the Court did not even mention . . . [Berger's] view that cutting off review would be unconstitutional."¹⁰⁹ Nonmention of a constitutional question in a case affords a dubious base upon which to build constitutional doctrine;¹¹⁰ and it can hardly weigh in the scales with unequivocal Supreme Court statements that arbitrariness is beyond the pale.

Professor Davis also relies on the fact that the complaint was dismissed without review on the merits, in spite of allegations that both the denial of the petition involved and the form of ballot used had

102. 4 DAVIS, TREATISE § 28.04, at 15.

103. *Id.* 17. Reliance on "superseded" cases by others is viewed with disfavor by Davis: "Jaffe should have found the many later cases that superseded the cases he cites." Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 635, 663 (1966).

104. 177 U.S. 290 (1900).

105. Davis, *Not Always* 650 n. 15.

106. 4 DAVIS, TREATISE § 28.05, at 18. Notable among such cases are *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959). In this area courts will "guard against arbitrary or capricious action." *McTiernan v. Gronouski*, 337 F.2d 31, 34 (2d Cir. 1964); *Brown v. Zuckert*, 349 F.2d 461, 463 (7th Cir. 1965).

107. 380 U.S. 650 (1965).

108. Davis, *Not Always* 645. It should be noted that the *Brotherhood* case involved not the second exception, for "discretion," but the first exception, for cases in which "statutes preclude judicial review," which raises entirely different questions.

109. Davis, *Not Always* 651 n.20 (emphasis added).

110. The Court has often rejected arguments, for example, that the issue of jurisdiction was settled because the Court had proceeded in earlier cases without noticing it. *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 137 n.2 (1947); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805).

been "arbitrary, capricious and discriminatory."¹¹¹ Nothing in the case suggests, however, that the Court's decision was anything more than the normal determination that the agency's action fell within the bounds of rational choice. The Court rejected the allegation that the denial of the petition had been arbitrary by finding the contention that the "Board ignored an express command of the Act" to be "completely devoid of merit."¹¹² In rejecting the allegation in the complaint that "the form of ballot . . . is arbitrary," the Court did say that "[t]he Board's choice of its proposed ballot is not subject to judicial review"¹¹³ But the Court also stated that "there is nothing to suggest that in framing [the ballot] the Board exceeded its statutory authority," and that the Board had been "careful to provide fair, yet effective procedures."¹¹⁴ These statements preclude any inference that the Board may be arbitrary in choosing a ballot, and make it clear that the *Brotherhood* case is no exception either to the Court's subsequent statement that "delegated power, of course, may not be exercised arbitrarily,"¹¹⁵ or to the general rule that arbitrariness is reviewable. Thus the "most important single case against Berger's view" will not support the inferences Professor Davis would wrest from it.

In harmony with his general emphasis on considerations of agency and court convenience rather than upon the rights of those adversely affected by agency action, Mr. Saferstein relegates consideration of my constitutional arguments to a footnote. "Berger," he remarks, "also makes a constitutional argument, which seems to say that a claim of abuse of discretion always rises to constitutional magnitude."¹¹⁶ "[I]f a broad definition of 'abuse' is meant," he says, apparently with "unwise use" or some equivalent in mind, "it is unlikely that most alleged abuses will rise to such a level."¹¹⁷ If the normal narrower meaning governs, however, Mr. Saferstein's objections fade. Apparently he approves Judge Friendly's suggestion that an abuse of discretion standard can be used as a criterion for review if defined

111. Davis, *Not Always* 645.

112. 380 U.S. at 671.

113. Davis, *Not Always* 645.

114. 380 U.S. at 67.

115. *FCG v. Schreiber*, 381 U.S. 279, 292 (1965). Davis himself states that "the courts have held administrative action . . . (2) unreviewable except on constitutional and judicial questions." 4 DAVIS, TREATISE § 28.02, at 6. Arbitrary action, concededly unauthorized by the Constitution, presents a "constitutional question." Compare *Lewis v. District of Columbia*, 190 F.2d 25, 27 (D.C. Cir. 1951): "The action of . . . administrative officers, is not to be declared unconstitutional unless the court is convinced that it is 'clearly arbitrary and unreasonable.'" See also note 88 *supra*.

116. Saferstein 373 n.31.

117. *Id.*

to cover only actions alleged to be "arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view."¹¹⁸ "With this narrow scope of review," says Mr. Saferstein, "an allegation of abuse arguably could always be reviewed without the balance between the individual and the institutions being upset."¹¹⁹ From the very beginning I emphasized that the terms "abuse of discretion" and "arbitrary, capricious action" are used interchangeably by the courts,¹²⁰ and my concern has always and explicitly been with "Administrative Arbitrariness." Consequently my views do fall within the "narrow" Friendly formulation, and as Mr. Saferstein recognizes, the "narrow standard [does] require at the least a summary review of the administrative action."¹²¹

But Mr. Saferstein leaves his position on the constitutional argument in some confusion, for he maintains that whether the definition of abuse be "broad" or "narrow," and "granting that judicial relief is often guaranteed on certain allegations," "there is no reason to believe that such a right [of judicial review] would not depend—as do so many constitutional rights—upon a balancing process . . . between the individual and the institutional interests."¹²² And he states that "the committed-to-agency-discretion doctrine . . . usually yields to nonfrivolous constitutional claims such as those of deprivation of property and liberty without due process."¹²³ If this is designed to differentiate deprivation of "due process" from what Justice Jackson called its chief object, to protect the individual against governmental arbitrariness,¹²⁴ Mr. Saferstein is badly mistaken.

In deciding on the merits in a given case whether there was arbitrariness, possibly the court may "balance" the individual interest against institutional interests, though one may doubt whether a little bit of arbitrariness should be better sheltered than a little bit of rape.¹²⁵ Constitutional rights would be in parlous straits were they

118. *Id.* 375-76.

119. *Id.* 376.

120. Berger, *Article 57*. See also note 22 *supra*.

121. Saferstein 377.

122. *Id.* 373 n.31.

123. *Id.* 369-70.

124. See pp. 980, 982 *supra*.

125. Professor Bickel criticizes *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961), in which the discharge of a short-order cook at a naval gun factory was sustained on "security" grounds:

[I]t is surely startling to encounter the constitutional principle that the government must grant hearings to private persons before inflicting palpable injury, except that it need not do so when the injury, though undoubted and bitterly complained of, seems slight.

A. BICKEL, *THE LEAST DANGEROUS BRANCH* 168 (1962). See also note 82 *supra*.

left at the mercy of untested assertions of "frivolity," or of preliminary judicial "balancing" to determine whether there has been enough injury to a constitutional right to entitle the individual to complain and be heard. To the contrary, as the Supreme Court has stated the rule: "It is to be presumed in favor of the jurisdiction of the Court that the plaintiff may be able to prove the right which he asserts in his declaration."¹²⁶ And the constitutional ban on arbitrariness, I submit, bars Mr. Saferstein's doctrine of "nonreview" couched in terms of "a refusal to *hear* an allegation against any part of an agency determination."¹²⁷

Nor should "excessive cost" to the agency or the courts¹²⁸ be "balanced" against invasion of the constitutional right to be protected against unreasonable officialdom. "Due process" can hardly be denied because protection is "inconvenient." "We must not," said the Second Circuit, "play fast and loose with basic constitutional rights in the interest of administrative efficiency."¹²⁹ Indeed, the Senate Report stated that the APA "must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations."¹³⁰ When Mr. Saferstein concludes that "to demand that courts give review whenever a complaint utters the formula 'abuse of discretion' is to hazard a serious misallocation of judicial resources as well as a stifling of agency and congressional programs,"¹³¹ he posits that man exists for the state rather than, as our Founders conceived, that the state exists for the protection of the individual. In the Convention, James Wilson asked, "Will a regard to

126. *United States v. Lee*, 106 U.S. 196, 219 (1882). Where "there is a prima facie showing of arbitrariness . . . the injured party is entitled to be heard." *Friend v. Lee*, 221 F.2d 96, 102 (D.C. Cir. 1955).

127. Saferstein 368 (emphasis added). The legislative history shows Congress had no such "refusal" in mind. Note 77 *supra*.

128. See the editors' summary of Mr. Saferstein's article, 82 HARV. L. REV. 367.

129. *United States v. Fay*, 247 F.2d 662, 669 (2d Cir. 1957) (Medina, J.) (refusal to reject habeas corpus on ground it was improbable petitioner would be able to prove his assertions). See also *Sewell v. Pegelow*, 291 F.2d 196, 198 (4th Cir. 1961) (rejecting argument that "if a hearing is ordered in this instance it will encourage a flood of such petitions").

The Supreme Court said of a denaturalization based upon prolonged residence in the country of origin that such legislation touching on the "most precious rights" of citizenship would have to be justified under the foreign relations power "by some more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." *Schneider v. Rusk*, 377 U.S. 163, 167 (1964).

130. S. Doc. No. 248, at 191. Application of Mr. Saferstein's elaborate criteria for making a preliminary determination whether to review arbitrariness, Saferstein 371-95, would bog the courts down far more than a determination whether the facts make out unreasonable conduct. Compare *Cappadora v. Celebrezze*, 356 F.2d 1, 6 (2d Cir. 1966): "a review of refusals to reopen necessarily limited to abuse of discretion, would impose a relatively slight burden on the agency and the courts." (Friendly, J.)

131. Saferstein 375.

state rights justify the sacrifice of the rights of men?"¹³² And as Justice Wilson, he declared in his 1791 Lecture that the purpose of this "magnificent" "structure of government" was for the accommodation "of the sovereign, Man," and that the "primary and principal object" was "to acquire a new security" for *his* rights.¹³³ In large part judicial review owes its being to the Founders' anxiety for the protection of private rights; and it would be a betrayal of judicial responsibility were the courts to bow out on the plea that they are too busy to afford such protection.

Mr. Saferstein is also troubled by the "uncertainties in defining and applying an abuse-of-discretion standard in the past"; it is not clear, he says, quoting Judge Friendly, "precisely what this [standard] means."¹³⁴ One can categorize some types of arbitrariness on the basis of the cases,¹³⁵ but it is true that "No standard or measuring stick has been or can be devised that may be successfully applied in all cases."¹³⁶ That difficulty, however, is no greater than that of defining the myriad varieties of "unreasonable" conduct in negligence cases, or of determining when a restraint of trade is "unreasonable" in an antitrust case; yet no attempt to wall off the assertion of such claims has been made in those fields. Lack of tidy definition pervades the entire domain of due process itself,¹³⁷ but no one suggests that the enforcement of due process must therefore be abandoned or curtailed. In practice, courts have experienced no great difficulty in recognizing "arbitrary" conduct, which must strike a court as "unreasonable" in all the circumstances.

V. Professor Davis's Codification Argument

Unlike Mr. Saferstein, Professor Davis does not claim that his as yet unborn "committed" "solution" was codified in 1946. Instead he relies on the "1966 codification of the APA" as a "conclusive" demonstration that his view had been "codified," invoking the rephrased statement that judicial review does not apply to "agency action . . .

132. 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 494 (1911). In *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, 468 (1793), Justice Cushing declared that the "great end and object of [states] must be, to secure and support the rights of individuals, or else, vain is government." See also note 190 *infra*.

133. 2 J. WILSON, *WORKS* 453-54 (Andrews ed. 1896).

134. Saferstein 376 & n.39.

135. Berger, *Article* 82.

136. *In re Albert Dickinson Co.*, 104 F.2d 771, 775 (7th Cir. 1939).

137. Compare *Galvan v. Press*, 347 U.S. 522, 530 (1954), employing a "fair play" test of due process. "Fair play" is no more precise a standard than "unreasonable" action.

committed to agency discretion by law.”¹³⁸ But for the transfer of the words “by law” from the original “committed by law” to the end of the phrase, and substitution of “to the extent that” for “so far as,” the “codified” exception is in relevant part identical with that of 1946.¹³⁹ Nevertheless Professor Davis affirms: “The codifiers have taken my view. . . . [T]heir view is the law because Congress has enacted it.”¹⁴⁰ This is his entire argument.

Simple retention of the original “committed” phrase does not spell approval of his artificial interpretation. Of course, “discretion,” in the sense employed by the courts, is unreviewable. But the codifiers nowhere indicate that “abuse of discretion” or arbitrary action is also unreviewable, in whole or in part. Professor Davis himself states that “the theory of codification is that no substantive change is made, and I agree with the codifiers that in this provision they have made no substantive change.”¹⁴¹ In that event, “codification” left him exactly where it found him, struggling to impose his “solution” after enactment. Once more refutation of Professor Davis may be based upon his own text. Speaking of the related “reenactment rule”—the doctrine that subsequent reenactment of a statute constitutes adoption of its administrative construction—he states: “Chief Justice Warren quite accurately said for the Court in 1955 that ‘reenactment . . . is an unreliable indicium at best.’”¹⁴² “Whenever a congressional awareness of the administrative interpretation does not appear, and seems unlikely,” states Professor Davis, “the basis for the reenactment rule vanishes.”¹⁴³ There is not a scintilla of evidence that either Congress or the codifiers were apprised of his “solution.”

138. Davis, *Not Always* 644.

139. Administrative Procedure Act § 10, 60 Stat. 243 (1946), provided: “Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . .” The 1966 codification, 80 Stat. 392, 5 U.S.C. § 701 (1966), provides: “This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”

140. Davis, *Not Always* 644. So sure is he that he has scored a stunning triumph that he concludes: “This means that Berger’s main position that the APA makes such action reviewable becomes an unseemly posture of lying flat on his back with all four wheels spinning. The APA can have no effect on something to which it does not apply. The codifiers have taken my view.”

141. *Id.* 650 n.12.

142. 1 DAVIS, *TREATISE* § 5.07, at 333.

143. *Id.* 334. At 335 he states:

A 1957 decision of the Supreme Court refusing to apply the reenactment rule seems especially encouraging and would be much more encouraging if only one could find reason to believe that the Court would consistently follow it in the future: . . . “The regulation had been in effect for only three years, and there is nothing to indicate that it was ever called to the attention of Congress. The reenactment . . . was not accompanied by any congressional discussion which throws light on the intended scope. In such circumstances we consider the 1951 reenactment to be without significance.” [United States v. Calamaro, 354 U.S. 351, 359].

Finally, discussing a Treasury Regulation in the frame of "reenactment" he states in his text: "It was not and could not have been a codification of judicial decisions, for the decisions were often conflicting."¹⁴⁴ Viewed most favorably to Professor Davis, the best that can be said of the decisions since 1946 is that they were "conflicting." By far the largest number of cases unconcernedly declare arbitrariness reviewable without so much as a glance at either the second exception or the Davis "solution."¹⁴⁵ A few cases held that the discretion excep-

144. 1 DAVIS, TREATISE § 5.05, at 321. The Court also stated in *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947): "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action."

145. As in the case of the pre-1946 cases collected in note 11 *supra*, the vast majority of post-1946 cases formulate the problem in the same earlier terms, *e.g.*, search for a "rational" basis, whether the action is "arbitrary or capricious" and the like.

Supreme Court: *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947) ("breadth" of "discretion" precludes review of the Commission's judgment "save where it has plainly abused its discretion."); *Niagara-Hudson Corp. v. Leventritt*, 340 U.S. 336, 347 (1951) ("In the absence of abuse of its discretion, the Commission's plan is . . . lawful and binding"); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 126 (1962) (review "limited to consideration of whether [the order] has a rational basis"); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 622 (1966) (facts not "sufficient to establish that the Commission abused its discretion"). *First Circuit*: *S.D. Warren Co. v. NLRB*, 342 F.2d 814, 816 (1965) ("arbitrary action" reviewable); *Old Colony Furniture Co. v. United States*, 95 F. Supp. 507, 509 (D. Mass. 1951). *Second Circuit*: *United States Lines Co. v. CAB*, 165 F.2d 849, 852 (1948) (no review absent "arbitrary exercise of discretion"); *Mastrapasqua v. Shaughnessy*, 180 F.2d 999, 1002 (1950) (court can compel "correction of an abuse of discretion"); *Grace Line v. Federal Maritime Bd.*, 263 F.2d 709, 711 (1959) (court must be satisfied "administrative decision has a 'rational' or 'reasonable' foundation"); *Wong Wing Hang v. Immigration & Naturalization Serv.*, 360 F.2d 715, 718 (1966) (Friendly, J.) ("only in the rare—some say non-existent case . . . may review for 'abuse' be precluded"). *Third Circuit*: *NLRB v. J.H. Matthews Co.*, 342 F.2d 129, 131 (1965) (action will be set aside as arbitrary if "not supportable on any rational basis"); *Dooley v. Highway Truckdrivers & Helpers*, 192 F. Supp. 198, 200 (D. Del. 1961) ("A reasonable determination is the antithesis of one which is arbitrary"). *Fourth Circuit*: *RFC v. Lightsey*, 185 F.2d 167, 170 (1950) (conclusive unless "arbitrary and capricious"). *Fifth Circuit*: *Nadiak v. CAB*, 305 F.2d 588, 593 (1962) (wide discretion: review confined "to whether there was an abuse of discretion"); *United States v. Marshall Durbin Co.*, 363 F.2d 1, 5 (1966) ("If the order is arbitrary . . . judicial review may be obtained"). *Sixth Circuit*: *General Motors Corp. v. United States*, 324 F.2d 604, 605 (1963) (action will be set aside if "arbitrary or capricious"). *Seventh Circuit*: *United States ex rel. Beck v. Neelly*, 202 F.2d 221, 223 (1953) (court will set aside action for "manifest abuse of discretion"); *Obrenovic v. Pilliod*, 282 F.2d 874, 876 (1960) (court will "examine the record to see whether discretion . . . has been abused"). *Eighth Circuit*: *NLRB v. Minnesota Mining & Mfg. Co.*, 179 F.2d 323, 326 (1950) (Section 10(e) made no "material change in the scope of review"; an order which is "arbitrary and capricious . . . may always be set aside"); *Irvin v. Hobby*, 131 F. Supp. 851, 865 (N.D. Iowa 1955); *NLRB v. Grace Co.*, 184 F.2d 126, 129 (1950); *Jenkins v. Macy*, 237 F. Supp. 60, 62 (E.D. Mo. 1964) (*re* Section 10(e): "As long as the administrative agency . . . had a sound basis for the decision made, and the decision was not arbitrary, capricious or an abuse of discretion . . . then the courts will not substitute their own decision"). *Tenth Circuit*: *NLRB v. Continental Oil Co.*, 179 F.2d 552, 554 (1950) (action will be set aside if "arbitrary or capricious"); *Smaldone v. United States*, 211 F.2d 161, 163 (1954) (discretion "means sound discretion . . . not discretion exercised arbitrarily"); *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363, 368 (D. Kan. 1947) (discretion "not subject to judicial control unless abused or exercised arbitrarily or capriciously"). *District of Columbia Circuit*: *Eustace v. Day*, 314 F.2d 247 (1962) (court will "not substitute its own judgment" if "there is a rational basis" for the conclusion); *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346, 349 (1953) ("One of [the APA] purposes was to enlarge the authority of the

tion, without qualification, cuts off review of abuse of discretion.¹⁴⁶ One case accepted his "solution," and a couple paid it lip service,¹⁴⁷

courts to check illegal and arbitrary administrative action"). *Court of Claims: Gadsden v. United States*, 78 F. Supp. 126, 127 (1948) ("In innumerable cases it has been held that where discretion is conferred . . . if [a decision] is arbitrary and capricious . . . the courts have power to review it and set it aside"); *Wales v. United States*, 130 F. Supp. 900, 904 (1955) ("The doors of this court are always open to grant relief" against "arbitrary and capricious" action).

146. *United States v. One 1961 Cadillac*, 337 F.2d 730, 733 (6th Cir. 1964), does not rely on Professor Davis but concludes that the discretion exception cuts off review of abuse of discretion on the ground that "we have no right to disregard this plain language." See also *Pullman Trust & Savings Bank v. United States*, 225 F. Supp. 860 (N.D. Ill. 1964). It should be noted that this is not the Davis view: Professor Davis argues only for selective unreviewability. "Nothing in the legislative history supports an intent to deprive the courts of all power to correct any abuse of discretion." Davis, *Supplement* 21. "My opinion continues to be that under the APA administrative arbitrariness or abuse is *sometimes* unreviewable." Davis, *Not Always* 643. He takes a "middle [position] between the courts and Mr. Berger," stating that "some discretion is reviewable and some is not." *Id.* 646. Since my position is that of the numerous courts cited in note 145 *supra*, Professor Davis must refer by "courts" to the two cases cited in this footnote; these represent the "courts"!

147. *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), where the court adopted the Davis "solution" and became entangled in a maze in trying to apply it. See Berger, *Reply* 799-803. With the exception of that case the Ninth Circuit has applied the general rule, as expressed in notes 11 and 145 *supra*. *Willapoint Oysters v. Ewing*, 174 F.2d 676, 695 (9th Cir. 1949) (question: "whether the order is a rational conclusion and not so unreasonable as to be capricious, arbitrary, or an abuse of discretion"); *Western Airlines, Inc. v. CAB*, 184 F.2d 545, 551 (1950) (plaintiff can object to "clear abuse of discretion as the result of arbitrary or capricious action"); *Carlson v. Landon*, 187 F.2d 991, 997 (9th Cir. 1951) ("The judiciary . . . must be alert to strike down all arbitrary action"). See also *Adams v. Witmer*, 271 F.2d 29, 33 (9th Cir. 1959). After *Ferry v. Udall*, the Ninth Circuit returned to this rule. Speaking of the right of an entryman on public land, the court said: "This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious and illegal deprivation." *Coleman v. United States*, 363 F.2d 190, 196 (9th Cir. 1966). And in *Montgomery v. CIR*, 367 F.2d 917, 920 (9th Cir. 1966), the court stated: "In the absence of a strong showing . . . that such discretion has been abused, the charge must be rejected." In neither *Coleman* nor *Montgomery* was reference made to the second exception or to the *Ferry* teetering on the Davis "solution" as confined to "permissive" statutes.

Professor Davis states that *First Nat'l. Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965), "specifically adopts my analysis." Davis, *Postscript* 814. The court said:

Abundant authority, with which we agree, holds that the comptroller's determination in the present area is not immunized from review by the exemption in the preface of § 1009 . . . [for agency discretion]. [His] discretion . . . is not the type of discretion to which action has been "committed by law" but rather one of the character expressly made reviewable by § 1009(e).

352 F.2d at 270, citing Professor Davis. The court furnishes no clue to the criteria which make arbitrariness nonreviewable; and such effect as *Saxon* may have is diluted by the fact that the Fourth Circuit has since declared without reference either to *Saxon* or Professor Davis that a court may reverse when an administrative decision is "arbitrary, unreasonable, [or] capricious." *Halsey v. Nitze*, 390 F.2d 142, 144 (1968).

So too, the Eighth Circuit, after a line of orthodox statements, note 145 *supra*, said respecting the Comptroller's "discretion":

[T]he congressional grant of authority does not empower arbitrary and capricious action, nor does it contemplate abuse of that discretion. . . .

. . . This holding we believe to be consistent with § 10. . . . [N]or is this the type of agency action that is by law committed to agency discretion so as to be 'immunized from review by the exception.'

Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 387, 388 (8th Cir. 1966). The court merely cited *First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965), without affording any clue to what was required to "immunize from review." On the other hand, the court also stated: "absent a congressional design to bar all judicial review [e.g., by preclusive statute withdrawing jurisdiction] injunctive relief is available where administrative remedies are . . .

forming a third category. A number of cases, recently augmented, reject the second exception as a limitation on review of arbitrariness.¹⁴⁸ Thus in 1966 there were four groups of decisions; and by his own test, "there could not have been a codification of judicial decisions, for the decisions were often conflicting."¹⁴⁹ The majority of courts since 1966

inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions . . .", 370 F.2d at 387, all of which deprives the passing reference to *First Nat'l* of force. Compare a later three-judge court case in the Eighth Circuit, Chamber of Commerce of Fargo, N.D., v. United States, 276 F. Supp. 301, 305 (D.N.D. 1967): under Section 10(e) the "Court has the duty to hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion . . ."

In sum, Professor Davis can count on only one flat holding, *Ferry v. Udall*, which apparently has been abandoned by the Ninth Circuit, and two passing references to possible immunization in cases which said there could be review of arbitrariness in the circumstances at bar. Nevertheless, these few cases underline the need for dispelling the fog which Professor Davis has blown up around a very simple statutory phrase.

148. The second exception has been held inapplicable in *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 316 n.14 (D.C. Cir. 1967):

Appellee apparently would have us adopt the view that the act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of discretion. The legislative history of the Administrative Procedure Act belies this position [quoting The McCarran-Donnell colloquy, p. 972 *supra*].

To the same effect, see *Velasco v. Immigration & Naturalization Serv.*, 386 F.2d 283, 285 (7th Cir. 1967), which relied for jurisdiction on Section 10(e) and stated: "The standard of review is whether the administrative agency committed an abuse of discretion." Though the determination "was a matter of administrative discretion," it could be set aside for a "clear abuse of such discretion." *Id.* at 286. And in *Amarillo-Borger Express v. United States*, 138 F. Supp. 411 (N.D. Tex. 1956), a three-judge court rejected the argument that arbitrariness was unreviewable because the matter was "committed to the discretion of the Commission," *id.* at 415, concluding that the "exercise of discretion" is "precisely [one of] the matters which Congress . . . intended should be under, not exempt from, the Administrative Procedure Act," *id.* at 418, citing the McCarran-Donnell colloquy. That is also the implication of Judge Holtzoff's statement in *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346, 349 (D.C. Cir. 1953), quoted at p. 994 *infra*. See also *Homovich v. Chapman*, quoted in note 30 *supra*. Finally, although Judge Friendly did ask in *Cappadora v. Celebrezze*, 356 F.2d 1, 5-6 (2d Cir. 1966), "whether the [Social Security] Act 'so far' commits decision to reopen to agency discretion that a refusal would not be open to review even in case of abuse," he declared that

we do not believe that Congress would have wished to close the doors of the courts to a plaintiff whose claim for social security benefits was denied . . . because of a truly arbitrary administrative decision. . . . Absent any evidence to the contrary, Congress may be presumed to have intended that courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

Rare are the statutes which give such "evidence to the contrary." Both Senate and House reports state:

[I]t has never been the policy of Congress to prevent the administration of its statutes from being confined to the scope of authority granted [*i.e.*, "sound discretion"] . . .

[Otherwise] statutes in effect be blank checks drawn to the credit of some administrative officer or board.

S. Doc. No. 248, at 212, 275.

149. Consider against the background of the cases cited in notes 145, 148 and 150, Professor Davis's statement that "[t]he uniform case law is in accord with [his interpretation of] the literal words of the Administrative Procedure Act. . . . The courts uniformly give effect to the literal words of the 'except' clause." Davis, *Supplement* 17. For comment on his muddled use of "literal," see Appendix note 14 *infra*.

In his last word, he stated: "The Berger interpretation of the APA has nothing against it except the clear statutory words, the unanimous Supreme Court, the unanimous lower courts, and now the unanimous Congress in the codification!" Davis, *Not Always* 644. Glory Hallelujah.

have sailed along without reference to the Davis "solution" or the "codification" of his view;¹⁵⁰ and that view, though not tagged with his name, has in fact been explicitly rejected by the District of Columbia Circuit,¹⁵¹ which handles a large proportion of the administrative agency litigation.

VI. Nonreview Exceptions

Before discussing pre-APA "exceptions" to the general rule that arbitrariness is reviewable, let me repudiate a fatuous position that Professor Davis would attribute to me. "Berger's main thesis," he asserts, "is that the Administrative Procedure Act makes administrative arbitrariness or abuse of discretion *always* judicially reviewable."¹⁵² By way of triumphant refutation he cites the Veterans Administration Act, which "makes certain decisions on veterans' claims 'final and conclusive'" and provides that "no . . . court . . . shall have power or jurisdiction to review."¹⁵³ That situation is governed by the *first* exception of Section 10 for cases in which "statutes preclude review"; and when *all* jurisdiction to review is withdrawn by statute, the Section 10(e) directive to set arbitrariness aside obviously cannot apply.¹⁵⁴ Not for me the argument that one part of the Act makes hash of another. Whether Congress may constitutionally cut off all review of a constitutional claim is a different question, to which I have addressed myself at considerable length elsewhere.¹⁵⁵ And *if* the Constitution

150. *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 316 n.14 (D.C. Cir. 1968), *see* note 148 *supra*; *Halsey v. Nitze*, 390 F.2d 142, 144 (4th Cir. 1968), *see* note 147 *supra*; *Louisville & Nashville R.R. v. United States*, 268 F. Supp. 71, 75 (W.D. Ky. 1967) ("An order is arbitrary within the meaning of the APA if it lacks a stated rational basis"); *Velasco v. Immigration & Naturalization Serv.*, 386 F.2d 283, 285, 286 (7th Cir. 1967), *see* note 148 *supra*; *Chamber of Commerce of Fargo, N.D., v. United States*, 276 F. Supp. 301, 305 (D.N.D. 1967), *see* note 147 *supra*; *Atewooftakewa v. Udall*, 277 F. Supp. 464, 468 n.7 (D. Okla. 1967) ("administrative action must have a 'reasonable' or 'rational' basis if it is to avoid the stigma of arbitrariness"); *Kolstad v. United States*, 276 F. Supp. 757, 761 (D. Mont. 1967) (court will not "substitute its own judgment for that of the administrative agency" if there is a "rational basis" for the conclusion).

151. *Overseas Media Corp. v. McNamara*, quoted in note 148 *supra*.

152. Davis, *Not Always* 643.

153. *Id.* 646; 72 Stat. 1115 (1958), 38 U.S.C. § 211(a) (1966).

154. Professor Davis recognizes in a footnote that I confine my "discussion to the second exception of § 10 [and consider] that anything governed by the first exception can be excluded from [my] discussion." *Id.* 652 n.30. But he comments: "One of the strangest positions Mr. Berger takes is that a court's denial of review on the ground that a statute precludes review is not authority against his position that arbitrariness is always reviewable," *id.*, appealing again to the "Not Always Reviewable" straw man to whom his last piece was dedicated. For discussion of the relation between the two exceptions, *see* note 66 *supra*.

155. Since adequate discussion is impossible here, I must be content to say that my own protracted re-examination of the source materials—the records of the Federal Con-

itself cuts off review, a matter to which I shall recur, I would not be so callow as to maintain that the APA overrides the Constitution.

The issue of pre-APA "exceptions" to the general rule that arbitrariness is reviewable needs to be brought back into focus. The problem is not, as Professor Davis assumes, "whether some agency action must be unreviewable even to correct arbitrariness or abuse,"¹⁵⁶ but, since the statute governs, whether Section 10 makes it unreviewable, whether it leaves room for exceptions to the Section 10(e) mandate to set arbitrary action aside. If my analysis is sound, the terms of Section 10, confirmed by the legislative history, unqualifiedly direct courts to set arbitrariness aside. This may in Professor Davis's view be regrettable, but only Congress can cure regrettable legislative oversights.

In considering the scope of Section 10(e) it needs constantly to be borne in mind that Chairman Walter advised the House that agencies "do not have authority in any case to act blindly or arbitrarily,"¹⁵⁷ and that Chairman McCarran, shortly after enactment of the APA, explained to the bar that it is a "major premise of the statute that judicial review is not merely available but is plenary . . . [N]o citizen need complain that he is without it if he has been subjected to injury beyond the law."¹⁵⁸ Arbitrary action, be it remembered, is branded by Section 10(e) as "not in accordance with law." In sum, as Judge Holtzoff, a veteran of the Washington scene, stated:

Contemporary discussion and debate clearly demonstrate that one of the main objectives of the Administrative Procedure Act was to extend the right of judicial review. One of its purposes was to enlarge the authority of the courts to check illegal and arbitrary administrative action.¹⁵⁹

vention and of the state ratification conventions—and of other materials of that period, as well as a large body of writing about those materials and sources, which is set forth in R. BERGER, *CONGRESS V. THE SUPREME COURT*, (to be published; Harvard University Press 1969), led me to concur in Professor Hart's view that it is (and was) "a necessary postulate of constitutional government . . . that a court must always be available to pass on decisions of constitutional right to judicial process, and to provide such process if the claim is sustained" Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953). In *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (1948), the court said that Congress "must not so exercise" its "undoubted power to give, withhold, and restrict the jurisdiction [of the federal courts] . . . as to deprive any person of life, liberty or property without due process of law"

156. Davis, *Supplement* 17.

157. S. Doc. No. 248, at 368-69.

158. McCarran, *Improving "Administrative Justice": Hearings and Evidence: Scope of Judicial Review*, 32 A.B.A.J. 827, 893 (1946).

159. *American President Lines v. Federal Maritime Bd.*, 112 F. Supp. 346, 349 (D.C. Cir. 1953). See also Chairman McCarran's remark, p. 1000 *infra*. The Supreme Court has admonished that courts should be hospitable towards the "greatly expanded . . . availability

With this in mind, let us turn to two of Professor Davis's most dramatic examples, the "exceptions" for the military and the executive branch.

A. *The Military "Exception"*

Any assumption that the military is automatically shielded by a "general presumption against review" of arbitrariness is foreclosed by *Sterling v. Constantin*: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."¹⁶⁰ Moreover, only specified functions of the military are by the Section 2(a) definition of "agency" excluded from the operation of this Act," namely "(2) courts martial and military commissions," and (3) "military or naval authority exercised in the field in time of war or in occupied territory."¹⁶¹ These express exclusions, under familiar principles, leave all other military functions subject to the Act. As the Senate Report states: "certain war and defense functions are exempted, but not the War or Navy departments in the performance of their other duties."¹⁶² Although Professor Davis is aware that the military is included in Section 2(a),¹⁶³ he never comes to grips with the fact that Section 2(a) clearly makes the APA applicable to its non- "in the field" functions. In effect he argues that Congress could not have meant what it said, and offers what he apparently considers a simply smashing example of absurdity: "A lieutenant in Vietnam surely lacks authority to pick on the same private for every dangerous mission, but that does not mean a court will or should review."¹⁶⁴ Since Professor Davis assumes that "the technical law is that we are not at war in Vietnam,"¹⁶⁵ his example is not protected by the Section 2(a) exclusion of acts "in the field in time of war." On that hypothesis, a sorrier example to justify curtailment of the express statutory directive is hardly conceivable. Let us go beyond Professor Davis and assume a state of war, so that the courts by hypothesis have no APA jurisdiction. Suppose too that the lieutenant, warped by racial prejudice, persistently picks on a Negro for "every dangerous mission," which on the law of averages spells certain death. Should

of judicial review." *Heikkila v. Barber*, 345 U.S. 229, 232 (1953); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955).

160. 287 U.S. 378, 401 (1932).

161. 5 U.S.C. § 1009 (1946), now 5 U.S.C. § 551 (Supp III, 1968).

162. S. Doc. No. 248, at 191.

163. DAVIS, *TREATISE* § 28.16, at 81-82; Davis, *Not Always* 645.

164. Davis, *Not Always* 646.

165. Davis, *Postscript* 832.

one even in this case dogmatically *assume* that review of unconstitutional discrimination can be barred?¹⁶⁶

Another *reductio ad absurdum* posed by Professor Davis is an inquiry by the courts "whether a commanding officer of a domestic military post has abused his discretion in denying a requested leave."¹⁶⁷ Suppose that leave is persistently denied because the officer hates Negroes or redheads; should we strain to construe the APA so as to leave them at his mercy?¹⁶⁸ Professor Davis misconceives the issue when he asks: "Do we want the courts to review for possible abuse of discretion all the determinations made by officers of the army, navy and air forces in *domestic* military posts?"¹⁶⁹ What "we want" must yield to what the statute provides; and as we have seen, the APA exclusion of "in the field" functions manifests an intention to govern the nonexcluded "domestic military post."^{169a} Nor is this as self-evidently absurd as Professor Davis conceives. The Swedish Military Ombudsman was created "to guard citizens against abuses in military administration"; and if the examples cited by Professor Gellhorn¹⁷⁰

166. *Reid v. Covert*, 354 U.S. 1, 17 (1957), involved the conviction by a court martial in Britain of the wife of an Air Force sergeant for his murder. An Executive Agreement gave our military courts exclusive jurisdiction over offenses committed in Britain by American servicemen or their dependents. In reply to objections that the court martial denied fundamental rights, the government invoked the treaty power. The Court held that "[t]he prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined." Parenthetically, the exception afforded "courts martial" by Section 2(a) was unmentioned.

167. 4 DAVIS, *TREATISE* § 28.18, at 82.

168. "Assuredly, the commanding officer of an aircraft carrier docked in New York Harbor has absolute authority to order all visitors off at 5 P.M.; but may he order Jews off at 3, or may he order that anyone can be put off by being dumped into the sea?" A. BICKEL, *THE LEAST DANGEROUS BRANCH* 167 (1962).

169. Davis, *Postscript* 832 (italics in original). Of a soldier one may say, with even greater justice, what Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961), said of a prisoner: "[I]t has never been held that upon entering a prison one is entirely bereft of all his civil rights and forfeits every protection of the law." To the contrary, the Court long ago declared that "the humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong." *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 123 (1849).

169a. The parallel was sharply drawn by the Supreme Court in *O'Callahan v. Parker*, 37 U.S.L.W. 4465 (U.S. June 2, 1969), where a rape committed offpost by an Army sergeant was held not subject to court martial because it fell outside the fifth amendment exception for cases "when in actual service in time of War or public danger." In consequence, the statutory authorization of court martial ran afoul of fifth amendment guarantees.

170. Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1, 38 (1965). Among prosecutions cited are those of "a commissioned officer who had insulted a noncommissioned officer, and a commander who had punished draftees for being drunk" when "off-duty or on non-military premises."

Professor Jaffe notes:

There is quite obviously a movement in the direction of greater reviewability of military determinations, particularly in peace time. This probably reflects the fact of the peace time draft. The impact of military decision on the ordinary citizen is no longer a rare event born of emergency. It intrudes into the civilian's peace time life and may—witness the dishonorable discharge of the preinduction Communist—importantly affect the conditions of civilian life.

L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 368 (1966).

might not run the gauntlet of Professor Davis's a priori assumptions, they nevertheless give color of practicality to judicial review, even of petty military tyranny.

It is of course possible that in considering military cases the courts have overlooked the limited exemption for military affairs afforded by Section 2(a) and the directive of Section 10(e) to set arbitrariness aside. If that be the case, it is time to take account of these provisions; and if this imposes an undue burden on the military, let Congress, not Professor Davis, rewrite the Act.

B. *The Executive "Exception"*

In aid of a parade of horrors designed to demonstrate the wisdom of his argument for "selective unreviewability," Professor Davis points out that "the term 'agency' in the APA includes the President, cabinet members and other executive officers,"¹⁷¹ as indeed it does. My position, he implies, forces me to advocate review of "the President's activities in seeking peace in Vietnam," and of "the President's recognition or refusal of recognition of a foreign government,"¹⁷² as well as judicial authority "to decide whether President Kennedy abused his discretion in the Bay of Pigs venture."¹⁷³ Whether a private should be permitted, for example, to question President Kennedy's decision to protect our country against the Soviet missiles installed in Cuba may be doubtful. Possibly such determinations are confided by the Constitution exclusively to the President and are therefore placed beyond the reach of judicial review and Section 10 by the "political question" doctrine. But such issues are far too important to be brashly decided *ex cathedra*, particularly at a time when the rights of the enlisted man are in the process of reexamination. Then too, what person could reasonably maintain that a decision to enter into peace negotiations, or to recognize China, "adversely affected" him within the meaning of Section 10(a)? As always, it is more profitable to begin with the terms of the statute.

The inclusion of the President within the statutory term "agency" was not an oversight; the express Section 2(a) exclusion of "Congress [and] the courts" shows that the inclusion was deliberate. Congress has never stood in awe of the President, as its steadfast insistence over the years on securing information from the executive branch

171. Davis, *Postscript* 832.

172. Davis, *Not Always* 645.

173. Davis, *Postscript* 832.

notwithstanding claims of "executive privilege" attests.¹⁷⁴ Certainly Chief Justice Marshall, who had participated actively in the Virginia Ratification Convention,¹⁷⁵ was not overawed by the Presidency. In the Aaron Burr trial he stated: "That the President of the United States may be subpoenaed, and examined as a witness . . . is not controverted."¹⁷⁶ As for "cabinet members," Marshall stated in *Marbury v. Madison*: "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains injury, it cannot be pretended that his office alone exempts him from being sued" ¹⁷⁷ In recent times, Secretary of Commerce Sawyer was restrained from executing the President's decision to seize strike-threatened steel mills in order to assure continued production during the Korean war.¹⁷⁸ Professor Jaffe is thus quite correct in saying that "Presidential action is not necessarily immune from judicial scrutiny. . . . There should therefore be no rule which automatically bars a judicial test of validity simply because the machinery of the Presidency is implicated."¹⁷⁹

Professor Davis places great stress on the *Waterman* case.¹⁸⁰ That case, he states, "involved foreign relations some aspects of which called for secrecy," and review of the President's order respecting foreign air carriers was refused "*even when a statute unequivocally required review.*" The Court stated that the decision was "political, not judi-

174. Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. REV. 1014, 1287 (1965).

175. See, e.g., 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553-54 (1881), where he stated, "To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such protection."

176. *United States v. Burr*, 25 Fed. Cas. No. 14,694, at 187, 191 (C.C. Va. 1807). In *United States v. Lee*, 106 U.S. 196, 200 (1882), the Court declared: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

177. 5 U.S. (1 Cranch) 137, 170 (1803). In the North Carolina Ratification Convention James Iredell, a leader in the fight for adoption of the Constitution and later a Justice of the Supreme Court said, describing English law: "[N]o act of government should be exercised but by the instrumentality of some person who can be accountable for it." 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109 (1881) (emphasis added).

178. W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 352 (4th ed. 1960); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

179. L. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 769, 778, 781 (1958). Professor Frank Newman asks, with reference to the President's relation to a member of his cabinet:

Should a cabinet officer be defenseless against findings of bribery or sexual immorality? If he could show there was no evidence against him, or no evidence other than charges of a confessed liar, relief by way of declaratory judgment might well be appropriate. Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215, 220 n.15 (1961).

180. Davis, *Not Always* 645, 651 n.21; *Chicago & So. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

cial," *i.e.*, "in the domain of political power and not subject to judicial intrusion or inquiry,"¹⁸¹ because, the court added, such decisions "are wholly confided by our Constitution to the political departments."¹⁸² If that is indeed the fact, they lie outside Section 10(e) because Congress cannot make reviewable that which is made unreviewable by the Constitution. In any case, as Mr. Saferstein notes, a circuit court of appeals stated in 1968 that "[t]hough *Waterman* has not been overruled by the Supreme Court, its apparently sweeping contours have been eroded by recent Circuit Court opinions."¹⁸³ And the Court itself has since declared in *Baker v. Carr* that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁸⁴ After *Waterman*, *Reid v. Covert* held that the treaty power cannot be employed by the Executive in derogation of constitutional rights.¹⁸⁵ Professor Davis would thwart the congressional intention to make the executive branch accountable to an individual injured by its arbitrariness. If there are circumstances in which the Executive enjoys constitutional immunity, let that be *decided* on a record after hearing, not *assumed* at the threshold for purposes of barring review.¹⁸⁶

VII. Conclusion

In sum, the general rule has been and remains that while courts will not interfere with the sound exercise of discretion, they will review administrative action to ascertain whether it has a "rational" basis and is reasonable, or whether it is arbitrary. The cases cited earlier demonstrate that this is an incontrovertible proposition. Neither the military nor the Executive enjoys an absolute exemption from review. Professor Davis and Mr. Saferstein have not shown, nor can they show, that such exceptions to the general rule as existed prior to the APA were called to the attention of Congress, much less that Congress was asked to exempt them from the sweep of Section 10(e).¹⁸⁷

181. Davis, *Not Always* 645 (italics in original). Mr. Saferstein refers to the statute as only "seeming to authorize . . . review." Saferstein 378.

182. 333 U.S. at 111.

183. Saferstein 378 n.45; *Pan American World Airways, Inc. v. CAB*, 392 F.2d 483, 492 (D.C. Cir. 1968).

184. 369 U.S. 186, 211 (1962).

185. 354 U.S. 1 (1957), discussed at note 166 *supra*.

186. Compare *Adams v. Witmer*, 271 F.2d 29, 33 (9th Cir. 1959); in view of the Supreme Court cases, said the court, "we cannot assume that the discretion granted the officials of the Bureau . . . is an unreviewable one."

187. Professor Davis claims only that "[t]he legislative history is not inconsistent with my solution." Davis, *Postscript* 828.

On the contrary, Chairman Walter stated that the Act was intended to outlaw arbitrariness "in any case." And not foreseeing Professor Davis's easy conversion of "committed" to "unreviewable," Chairman McCarran stated: "It would be hard, therefore, for anyone to argue that this Act did anything other than cut down the 'cult of discretion'" ¹⁸⁸ It follows that no appeal to pre-existing exceptions lies for the purpose of cutting down the express statutory directive to set arbitrariness aside.

The terms of the statute cannot be altered on the basis of personal predilections and untested assumptions. If courts are to conclude that a given application of Section 10(e) is unreasonable or absurd, let it be on the basis of a carefully considered record, not a priori notions of "intrinsic unsuitability" for review. That task calls for full consciousness that the court is being asked to carve out an exception from the express terms of the Act, not for unquestioning acceptance of Professor Davis's "solution" to his semantic difficulties.

Chairman Walter opened his explanation of the APA with a reference to Pitt's warning that "unlimited power corrupts the possessor," and stated that "[t]oday, in the backwash of the greatest war in history, we need not be reminded of the abuses which inevitably follow unlimited power." ¹⁸⁹ The Section 10(e) directive to set arbitrary action aside represents a studied attempt to bar the play of arbitrariness on American soil, articulating a tradition that reaches back to James Wilson's declaration that "[e]very wanton . . . and unnecessary act of authority . . . is wrong and tyrannical." ¹⁹⁰ Professor Davis does not disparage such sentiments; he professes to "share Mr. Berger's passionate belief in a Supreme Court remark that 'there is no place in our constitutional system for the exercise of arbitrary power.'" ¹⁹¹ But he concludes that the courts "should not undertake to cure all arbi-

188. McCarran, *Improving "Administrative Justice": Hearings and Evidence: Scope of Judicial Review*, 32 A.B.A.J. 827, 893 (1946). For the House of Lords' resounding rejection of the "myth of unfettered discretion," see note 38 *supra*.

189. S. Doc. No. 248, at 351. Walter also noted that the Declaration of Independence complained the King had sponsored "arbitrary government."

190. 2 J. WILSON, WORKS 393 (Andrews ed. 1896). In 1789 R. H. Lee stressed "security against the depredations and gigantic strides of arbitrary power." 1 ANNALS OF CONG. 525 (Gales & Seaton ed. 1834) (running title: "History of Congress"). "[P]rotection of the individual from the arbitrary or capricious exercise of power was then believed to be an essential of free government." *Myers v. United States*, 272 U.S. 52, 295 (1926) (Brandeis, J., dissenting). Compare the proud boast of the General Court of Massachusetts in 1646: "Let them shew where hath been more care and strife to prevent all arbitrariness." Quoted in A. HOWARD, *THE ROAD TO RUNNYMEDE* 400, 408 (1967).

191. Davis, *Final Word* 815. He also stated: "Every one would like to have arbitrariness and abuse corrected." Davis, *Supplement* 17.

trariness in government.”¹⁹² Let them begin instead with curing such arbitrariness as Section 10(e) directs. Courts too are under a duty to respect the law. And in so doing they do well to bear in mind what Congress clearly understood—the most callous official will think twice before acting arbitrarily if he knows that the possibility of judicial review hangs over his head.¹⁹³ Reasonable judgments, even if mistaken, must be accepted by the individual as part of the price of an ordered society. But when unreasonable, they are intolerable. If they are to be sustained—indeed if constitutionally they can be—it should be after the most searching deliberation, not by resort to unfounded “presumptions against review.”

Appendix

A. *Legislative History Cited by Professor Davis*

1. The Senate Committee said: “Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion. . . . The basic exception of matters committed to agency discretion would apply even if not stated at the outset.”¹

The “basic exception” refers to the pre-APA discretion, defined by the courts as “sound” discretion as distinguished from arbitrary action or “abuse of discretion.” Since Professor Davis’s subsequent redefinition of “committed” to mean “unreviewable” was not before

192. Davis, *Final Word* 815. He believes that “the principal hope in a fight against the arbitrary exercise of discretion lies in measures other than judicial review.” Davis, *Postscript* 833. Perhaps the new measures he suggests might prove useful, if adopted; but in the meantime I would not discard the tried and true.

“It is clear,” states Professor Jaffe, “that the country looks, and looks with good reason, not to the agencies, but to the courts for its ultimate protection against executive abuse.” Jaffe, *The Right of Judicial Review*, 71 HARV. L. REV. 401, 406 (1958).

193. Both Senate and House Reports state that judicial review is “indispensable since its mere existence generally precludes the arbitrary exercise of power.” S. Doc. No. 248, at 217, 281. Warner Gardner, a long time government servant, stated that “the availability of judicial review is by far the most significant safeguard against administrative excesses which can be contrived.” Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 108, 138 (Paulsen ed. 1959).

One need not stop at the corruption of power:

[A] court *should* have the power to correct excessive administrative zeal. An agency is prone to single-mindedness. Fairness requires that it be checked not only for errors of law but for any patent injustice. The judges stand apart from the particular purposes of the agencies. They are set up to embody the community’s sense of justice. It is appropriate that the concept of “abuse of discretion” be conceived and used with a breadth sufficient to enable the courts to condemn shocking disproportion.

Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 HARV. L. REV. 865, 870 (1963).

1. Davis, *Postscript* 827.

Congress at the time of enactment, it cannot be maintained that the Committee's quotation of the statutory words "by law committed" gave its blessing to Professor Davis's redefinition. To the contrary, Congress indicated that "committed" simply meant "granted to,"² a synonym for the dictionary definition, "entrusted with."

2. The House Committee said: "Section 10 on judicial review does not apply in any situation so far as . . . agency action is by law committed to agency discretion. . . . Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act"³

Again "by law committed" means "by law committed" and nothing more despite Professor Davis's implication that his redefinition of the phrase was adopted. The reference to "broadly drawn" grants of "large discretion" speaks to the problems raised by standards which confer virtually limitless discretion. Where limits are not discernible, courts cannot police them.⁴

3. The Senate Judiciary Committee Print said of section 10: "The introductory exceptions state the two present general or basic situations in which judicial review is precluded—where (1) the matter is discretionary or (2) statutes withhold judicial powers." The word "present" seems to me [Davis] to indicate an intent to have previously-existing law continue with respect to review of discretion, and this is the interpretation courts have given.⁵

But immediately thereafter the Judiciary Committee Print stated that an "abuse of discretion granted by law" was to be reviewable,⁶ thereby precluding Professor Davis's subsequent redefinition of "committed" and confirming that the "present" law with respect to "discretionary" matters was that courts would not substitute their judgment for a "reasonable" determination but would set aside an "abuse of discretion."⁷ The few Davis citations of courts that uncritically echoed his "solution" barely stir the scales.⁸ Since Professor Davis seeks to carve out an exception from the unqualified Section 10(e) directive, he must show that Congress was aware of exceptional cases of nonreview and intended to have such "previously-existing law continue." No such

2. See p. 976 *supra*.

3. Davis, *Postscript* 827.

4. The Senate Report states: "If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by revision of statutes conferring administrative power." S. Doc. No. 248, at 212. See also H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).

5. Davis, *Postscript* 827.

6. S. Doc. No. 248, at 36, discussed at p. 976 *supra*.

7. See pp. 968-69 *supra*.

8. Compare notes 11, 145, 148 *supra*, with note 147 *supra*.

evidence can be found, and the word "present" cannot carry the burden.

4. The Attorney General said that section 10 "in general, declares the existing law concerning judicial review." Mr. McFarland [ABA spokesman] said: "We do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved."⁹

Given the general rule, expressed in numerous cases, that arbitrariness is reviewable, the "general presumption for reviewability," the total absence of mention of any case of nonreview that should be "preserved," plus Chairman Walter's statement that arbitrariness was impermissible "in any case," it is idle to read into the *Attorney General's* equivocal reference to "existing law" a *congressional* intention to limit its own express Section 10(e) directive. Mr. McFarland's "basic exception of administrative discretion" must be read in light of settled judicial usage, whereunder "discretion" meant "sound" discretion to the exclusion of its "abuse." If only Professor Davis could muster even *one* legislative statement or clear intimation that non-review of some instances of arbitrariness "must be preserved."

Indisputably "discretion" was to be "preserved." But the question is "was any part of 'abuse of discretion' to be preserved?" and that question is not answered by an *assumption*, in the teeth of judicial statements to the contrary, that "discretion" comprehends "abuse of discretion" and therefore arbitrary action was to be "preserved."

B. *Issues of Scholarly Integrity*

1. Repeatedly Professor Davis charges that although he pressed me to make "corrections" of alleged "clear-cut misquotations" before the publication of my *Sequel*, I refused because, he asserts, such correction "would destroy the basis for much of [Berger's] argument."¹⁰ A charge of willful misrepresentation in order to score in scholarly debate, if true, would render me unworthy of credence. If untrue, the charge tarnishes the scholarly integrity of a widely-cited commentator.

The "neatest example" of my "misquotations," amongst several that involve the same facts and which he states makes him "look hilariously inconsistent,"¹¹ does in truth reveal a glaring inconsistency which his tortuous explanation cannot remove. My articles demonstrated that his argument for a "literal" interpretation of the second "except" clause is at war with his statement that

9. Davis, *Postscript* 827.

10. Davis, *Not Always* 646, 653 n.34. See also p. 1005 *infra*.

11. *Id.* 653 n.34.

[t]he literal language says that a court shall set aside an abuse of discretion except so far as the agency may exercise discretion. But this makes neither grammatical nor practical sense, for the exception consumes the whole power of the reviewing court.¹²

To my query how he can in good conscience espouse mutually contradictory positions he replied, "The answer to this crucial question is easy."¹³ Boiled down by himself, this "easy answer" is:

I have consistently said that the combination ["of the 'except' clause with the 'abuse of discretion' phrase"] cannot be read literally, and I have consistently said that the "except" clause alone or in any combination *other than with* the "abuse of discretion" phrase is and should be read literally.¹⁴

If, however, the "except" clause cannot be read "literally" in combination with the "abuse of discretion" phrase, then the "literal" reading of the "except" clause was *totally irrelevant* to the subject of our debate, the impact of the "except clause" on "abuse of discretion." Why then did he repeatedly bombard me with a "literal" reading of the "except" clause? For example: "Mr. Berger wants to interpret away the 'except' clause. The courts uniformly give full effect to the literal words of the 'except' clause."¹⁵ "Unlike Mr. Berger," the courts "uniformly" read the "except" clause "literally";¹⁶ they uniformly decide in "accord with the literal words."¹⁷ Even the Supreme Court "reads that clause literally."¹⁸ Only Berger "rejects a literal interpretation of the provi-

12. Davis, *Supplement* 21.

13. Davis, *Not Always* 650 n.11.

14. *Id.* 653 n.34 (emphasis added). In fuller statement;

First, I have never said that the combination of the "except" clause with 10(e) makes no sense; what I have said is that the combination of the "except" clause with the "abuse of discretion" phrase of 10(e) makes no sense. Secondly, the literal reading of the "except" clause is always used in any combination other than with the "abuse of discretion" phrase. The literal reading is used in combinations with (a), (b), (c), (d), and all parts of (e) except the "abuse of discretion" phrase.

I know of no reason for rejecting a literal interpretation of the following combination of the "except" clause with a part of 10(e): "Except so far as . . . agency action is by law committed to agency discretion. . . . (e) . . . the reviewing court shall . . .

(B) . . . set aside agency action . . . found to be (1) arbitrary"

Id. 650 n.11. What Professor Davis means by "literally" is never made clear. If it means that the exception for "discretion" must be read to exclude all review of discretionary action, it "consumes the whole power of the reviewing court." Davis, *Supplement* 21. If by "literally" he means to identify the word "committed" in "committed to agency discretion" with "unreviewability," see note 48 *supra*, he gives an even more extraordinary meaning to "literally." What is "literal" about an arbitrary professorial redefinition of a word that ordinarily means "entrust with" to mean "unreviewable," and how are judges to know *this* is the "literal" meaning? Yet Professor Davis insists that "courts are unanimously giving the 'except' clause a literal interpretation"; courts uniformly read this provision literally, because they believe that Congress intended what it so clearly said"—namely Professor Davis's post-natal redefinition of "committed." Davis, *Supplement* 25.

15. *Id.* 17.

16. *Id.* 25.

17. *Id.* 17.

18. *Id.* 18.

sion of § 10.”¹⁹ To my demonstration that the Section 10(e) directive to set aside “abuse of discretion” was unaffected by the “except” clause, he replied:

[Berger’s] position [is] that the except clause of § 10 must be read as if it is not there. For instance, he says flatly at page 63 that “the ‘discretion’ exception does not bar review of ‘abuse of discretion’” He realizes that Congress has provided for review “except so far as . . . agency action is by law committed to agency discretion,” and that writing the “except” clause out of the Act does violence to the *plain words*. But he explicitly says that “a *literal reading* must be rejected.”²⁰

Undeniably, therefore, Professor Davis combined his “literal” reading of the “discretion” exception with the “abuse of discretion” phrase in order to rebut my position that the exception did not curtail the Section 10(e) directive to set arbitrariness aside. His latest assertion that the “combination [of the “except” clause with the “abuse of discretion” phrase] cannot be read literally” is patently irreconcilable with his earlier statements.

Moreover, he now stands his earlier argument on its head. On his present explanation a “literal” reading of the “except” clause is applicable to *all* the Section 10(e) categories *other* than the “abuse of discretion” phrase; it therefore “consumes [virtually] the whole power of the reviewing court” and would render it powerless to review discretionary action that was unconstitutional or in excess of jurisdiction. Can he really mean this? If even now I fail to understand him, I may be excused for “refusing” to admit that I had “misquoted” him. As well answer yes or no to the question “Have you stopped beating your wife?” And if the “except” clause cannot be read “literally” in “combination . . . with the ‘abuse of discretion’ phrase,” he has proved my point: the exception for “discretion” has no application to “abuse of discretion.”

Such are the shifts of desperate advocacy. It is on the basis of such materials that Professor Davis dares to charge, “Berger refuses to make correction. Making correction would destroy his argument.”²¹

My argument, however, does not stand or fall on a collateral comment on Professor Davis’ shifting positions. My argument is that the exception for “discretion” and the “abuse of discretion” directive incorporate the judicial antithesis between reasonable, and therefore unreviewable, action, and arbitrary, and therefore reviewable, conduct.

2. Another issue of scholarly accuracy, if not of veracity, is posed by his statement that

19. *Id.* 25.

20. *Id.* 16 (emphasis added). See also Appendix note 14 *supra*.

21. Davis, *Not Always* 654 n.34.

[t]he presumption idea was first advanced in my article . . . and later carried into . . . my *Treatise*. When the first of Mr. Berger's four articles appeared, I asked him why he ignored my § 28.21. By letter of March 2, 1965, he said that that section he had "inadvertently missed, much to my [Berger's] regret." In his later three articles he has *never mentioned* either his inadvertence or his regret.²²

Let my published explanation speak for itself:

He observes that these "fundamentals" would "[enlarge] . . . the area of reviewability," and yet I "ignored" them. [Davis, *Comment* 16]. This is yet another index of his indifference to accuracy. In his letter to me of February 23, 1965, he asked, "Why did you ignore my § 28.21?" My reply of March 2 stated that "you yourself lay down principles in § 28.21 (which I did not 'ignore' but inadvertently missed, much to my regret) which are at war with an easy assumption that arbitrariness should be insulated."²³

Careless misstatement in a commentator to whom the courts are constrained to turn for guidance is lamentable.

22. *Id.* 652 n.32 (emphasis added).

23. Berger, *Reply* 806 n.130.

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